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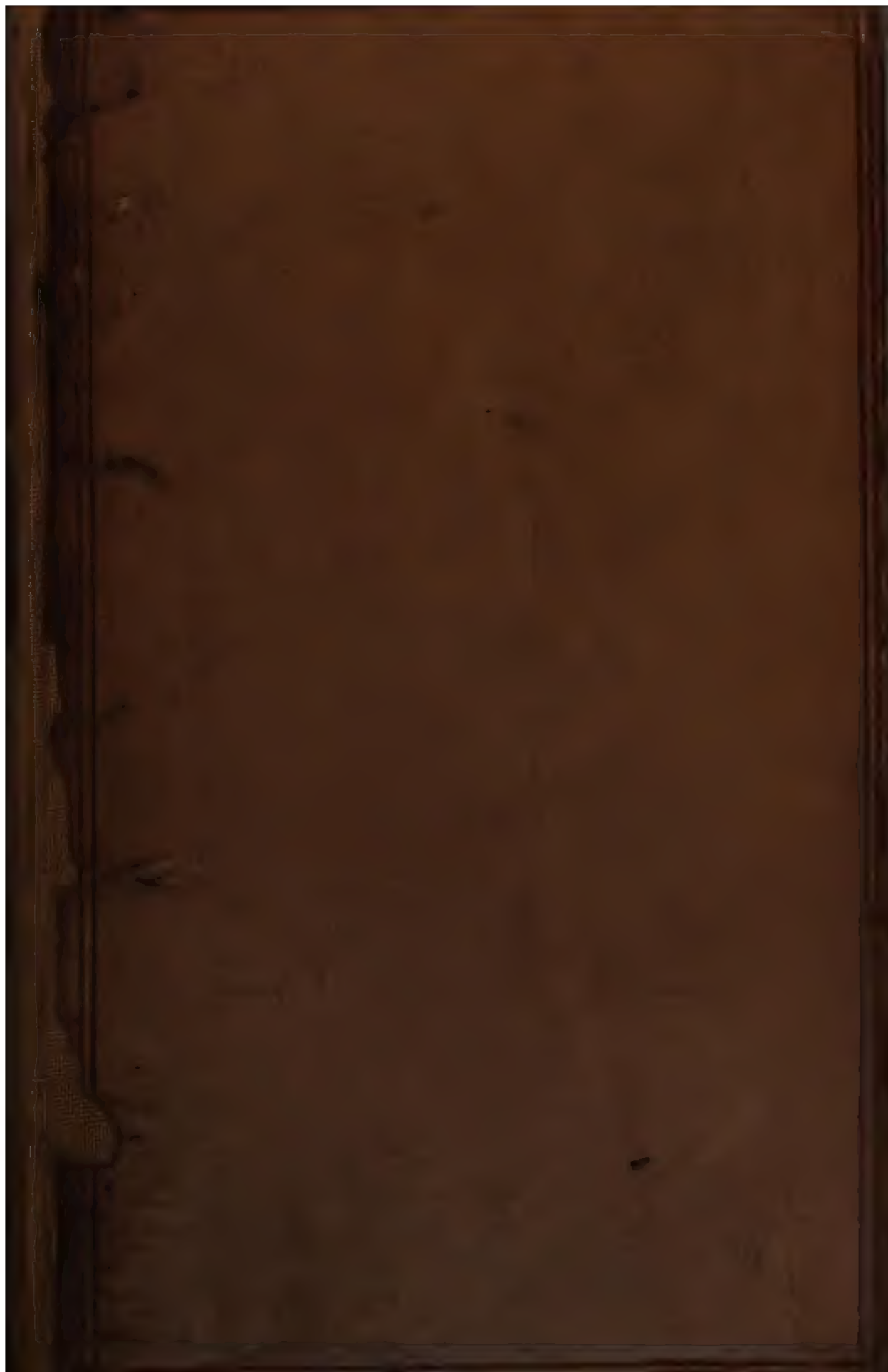
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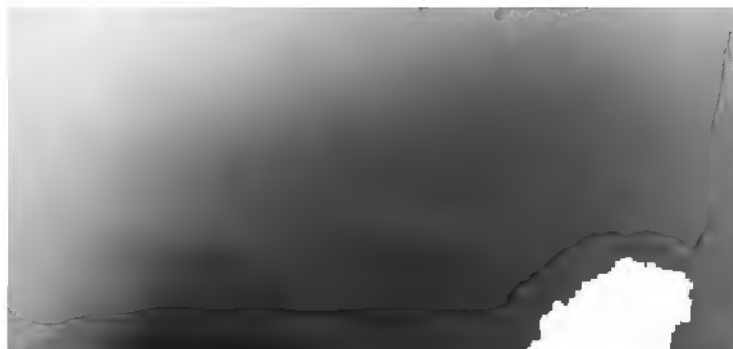


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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Queen's Bench Practice Court;

WITH

POINTS OF PRACTICE AND PLEADING

DECIDED IN THE

Courts of Common Pleas and Exchequer;

FROM HILARY TERM TO MICHAELMAS TERM, 1850.



BY

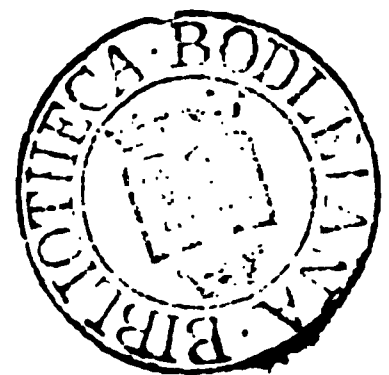
JOHN JAMES LOWNDES, OF THE INNER TEMPLE,
PETER BENSON MAXWELL, OF THE MIDDLE TEMPLE,

AND

CHARLES EDWARD POLLOCK, OF THE INNER TEMPLE,
ESQUIRES, BARRISTERS AT LAW.



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ERRATA ET CORRIGENDA.

- Page 125, line 12, for "Judge," read "Judges."
 157, n. (i), for "post," read "7 D. & L."
 280, in the heading, for "Cresswell," read "Maule."
 409, in marginal note, line 5, for "ca. sa.," read "capias."
 570, line 19, for "Rolls," read "Roades."
 668, marginal date, for "November 19," read "November 20."
 669, 70, 71, running title, for "Another," read "Others."

REPORTS OF CASES

DETERMINED ON

Points of Practice and Pleading,

IN THE

SUPERIOR COURTS OF LAW AT WESTMINSTER.

Hilary Term.

IN THE THIRTEENTH YEAR OF THE REIGN OF VICTORIA.



Ex parte WILLIAM DAGGETT.

[*Bail Court. Coram Erle, J.*]

Volume I.
1850.

January 11.

UDALL moved for a rule, directing the Master to substitute the name of William Daggett on the roll of attorneys, in the place of William Daggett Ingledew, and that the Master should be at liberty to make an indorsement of such alteration of name on the certificate of the applicant.

It appeared upon the affidavit of the applicant, upon which the motion was made, that he was admitted an attorney in the year 1848, and signed the roll by the name of William Daggett Ingledew, the surname, Ingledew, being that of his father, and which he then bore. That in December, 1849, his mother died, leaving him her heir at

An attorney who, without royal license, or any formal authority for the change, has assumed another name from that on the roll, for a specified reason, may have the roll altered to the assumed name, if it appear to the Court that such name has been taken

bonâ fide and without fraudulent intention.

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law, and expressing her desire that he would relinquish the use of the surname of Ingledew, and use that of Daggett only. That accordingly, in compliance with her desire, he did discontinue the use of the surname of Ingledew, and used, and was since commonly known by, the surname of Daggett only. That being in partnership with his father as attorney, the name of the firm had been changed to Ingledew and Daggett. An application had been made to *Wightman*, J., at Chambers, to the same effect as the present one; but his Lordship had referred the case to the Masters, who could find no instance of the change of name on the roll, unless the same had been changed by royal license, and *Wightman*, J., refused to interfere.

Udall. The correct and proper surname of a party is that which he himself uses, and by which he is commonly known; and no royal license is necessary to enable him to change it at any time. In *Doe d. Luscombe v. Yates* (a), where the objection was that a party had not sufficiently complied with the terms of a will that he should bear a particular surname, by merely assuming to use it, without obtaining a royal license or an act of Parliament for the purpose, Lord *Tenterden*, C. J., in giving judgment, said, "A name assumed by the voluntary act of a young man at his outset into life, adopted by all who know him, and by which he is constantly called, becomes, for all purposes that occur to my mind, as much and effectually his name as if he had obtained an act of Parliament to confer it upon him." In *Davis v. Lowndes* (b), the point was expressly ruled by *Tindal*, C. J., in charging the grand assize. There the devisee, by the terms of the will, was to take the name of Selby; and a fine was held to be properly passed, which was passed by him in that name, although he had not obtained any act of Parliament or royal letters of license for the purpose. The case went afterwards to the Exchequer

(a) 5 B. & A. 544, 556.

(b) 1 Bing. N. C. 618. See also 5 Bing. N. C. 161, 178.

Chamber on this very point, and the judgment of *Tindal*, C. J., was upheld (a). [*Erle*, J.—It may be taken as decided that the voluntary assumption of a surname is the legal assumption of a surname.] That is clearly laid down as law. The formal change by act of Parliament or royal license may make it more known, but cannot make the change more valid than the assumption of a new name without any authority, so that it is done bonâ fide and without fraud. [*Erle*, J.—There was a case, I recollect, where the question arose as to misnomer.] Probably the case of *Williams v. Bryant* (b) is the one referred to. There the defendant, by the name of William Bryant, had been the obligor in the bond sued on; but the declaration complained against defendant as William Francis Bryant, sued by the name of William Bryant; and that was held, on non est factum pleaded, to be no variance. [*Erle*, J.—Are there any other cases?] It has been held in the Common Pleas that they would not grant an application of this kind where no sufficient motive was disclosed (c); but since then, the same Court have granted an application of this kind (d), and there is a case in this Court in which it has been granted (e). In a criminal case, *Rex v. Norton* (f), the prosecutor's dwelling-house was described as the dwelling-house of Mary Johnson: this name she had assumed for five years, her original name being Mary Davis; and it was held by the Judges, on a point reserved, that she was properly described by her assumed name. [*Erle*, J.—Are there any cases that shew how long it takes after the alteration to make the assumed name the legal name?] There are not; the test appears to be, that the alteration must be made bonâ fide and without fraud. It is for the interest of the public

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(a) 7 Scott, N. R. 141.

(d) *Ex parte Benthall*, 1 D. & L.

(b) 5 M. & W. 447; S. C. 7 747.

Dowl. 502.

(e) *Ex parte Ware*, 6 Dowl.

(c) *Ex parte Hayward*, 5 Scott, 311.

712; S. C. *nom. Ex parte Ware*,
6 Dowl. 463.

(f) *Rex v. Norton*, R. & R.
510.

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that the name a party is known by should be on the roll ;
such alteration may, in fact, prevent fraud.

ERLE, J.—I do not see any reason why the name should
not be changed.

Application granted (a).

(a) Similar applications were made in the same case to the Courts of Common Pleas and Exchequer, and granted. Ex relat. *Udall*. See also the following case.

[The following case, decided in the Easter Term following,
may be here conveniently inserted.]

[April 16, 17.]

Ex parte THOMAS JAMES.

[*Bail Court. Coram Coleridge, J.*]

See the mar-
ginal note,
ante, p. 1.

SIMON moved for a rule, directing the Master to strike out the name of Thomas James Moses, which now appeared upon the roll of attorneys, and to substitute in lieu thereof the name of Thomas James only.

The affidavit of the applicant upon which the motion was made, shewed that he had been admitted an attorney in the year 1848, and that he had signed the roll of attorneys by the name of Thomas James Moses; the surname of his father, and which he then bore, being Moses. That in the present month of April, his father had consented to advance a large sum of money to enable him to enter into partnership; but that before doing so, he was desirous that his son should cease to use the surname of Moses, and should use and be known by the name of Thomas James only. That accordingly he had since (a) ceased to use

(a) The day named in the affidavit as the day since which he had used the name of Thomas James only, was the 8th of April,

the surname of Moses, and had used the name of Thomas James only. That he made this change for no improper purpose, but *bonâ fide* and without fraud. It did not appear that he had obtained any royal license to change his name.

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JAMES.

Simon. There was a similar application to the present granted in the last Term, *Ex parte Daggett (a)* before Mr. Justice *Erle* in this Court, except that in that case, there was no valid reason for the alteration, but only a desire to comply with a parent's wish. Here the applicant's advancement in life in some measure depends on it.

COLERIDGE, J.—My difficulty is as to altering the roll, when it is right, but I will consider the application.

Cur. adv. vult.

On the following day,

COLERIDGE, J., delivered judgment.—This was an application that the name of an attorney upon the roll of attorneys should be changed; and a case of *Ex parte Daggett (a)* was referred to in support of the motion. The doubt that I entertained was this; the roll of attorneys is a permanent record, and is true in fact; the attorney was admitted by the name of Thomas James Moses; and, therefore, there is some inconvenience in altering the roll, inasmuch as any one would think, on reading it, that an error had been committed, and that his name had been wrongly signed as Thomas James Moses, when in truth it was not. Before now I have refused an application of this kind at Chambers: but the case referred to is an authority for granting this motion, and I have consulted some of the Judges, who think that the

and the affidavit was sworn on the 13th; but these dates were not brought specifically under the notice of the Court.
(a) *Ante*, p. 1.

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entry ought to be permitted. I think, however, that in making the alteration, the Masters should take care that the roll should shew that it is a change of name, and not that an error has been committed; and I also think that in future applications of this kind, there should always be an allegation that the applicant is not apprehensive of any proceeding being taken against him by the name on the roll.

Application granted (*a*).

(*a*) On the 23rd of April, in the same Term, *Simon* made a similar application in this case to the Court of Common Pleas. [*Cresswell*, J.—Is the name “James” a second surname or a Christian name?] It does not appear. [*Cresswell*, J.—Then there is some difficulty in granting this application. If this gentleman seeks to substitute one surname for another, without any improper object in view, there is no objection to his doing so; but if “James” is a baptismal name, and not a surname, then it might perhaps be contended, if he signed the roll as Thomas James, that his name is not on the roll of attorneys at all.] An application of the same kind was granted in last Term in *Ex parte Daggett* (*ante*, p. 1.) [*Cresswell*, J.—There the person had a double surname. But suppose the application were to sign one single baptismal name, as John or Thomas, would the Court allow that? And if “James” is not a surname in this case, Thomas James together form only one single baptismal name. *Wilde*, C. J.—I should have thought that the more correct application would have been to sign by the name of Thomas James James.]

Cur. adv. vult.

On the 1st of May in the same Term,

WILDE, C. J., said, that *Cresswell*, J., had mentioned this matter to the other Judges, and that the Court would grant the application.

Application granted.



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Ex parte LUKE ALPHONSO TEATHER.

January 14, 15.

[*Bail Court. Coram Erle, J.*]

WELLS moved for a rule, calling upon the poor law commissioners for England and Wales, to shew cause why a writ of mandamus should not issue directed to them, commanding them to restore Luke Alphonso Teather to the office of relieving officer of the Godstone Union, in the county of Surrey.

The poor law commissioners have authority, under the 4 & 5 Wm. 4, c. 76, s. 48, to remove the relieving officer of a poor law union, at their discretion, without complaint and without summons or hearing.

It appeared from the affidavit of Mr. Teather, on which the motion was made, that he had been appointed in November, 1835, by the board of guardians for the Godstone Union, in the county of Surrey, relieving officer for the district of such union, which consists of fourteen parishes. That he held such situation until the 14th of December, 1849, when he was removed from such situation by an order from the poor law board, a copy of which was annexed to the affidavit, and which was in the following form :—

Godstone Union.

To the guardians of the poor of the Godstone Union, in the county of Surrey:

To Mr. L. A. Teather, the relieving officer of the said union :

To the clerk or clerks to the justices of the petty sessions held for the division or divisions in which the said union is situated, and to all others whom it may concern :

We, the poor law board, hereby declare that we deem L. A. Teather unfit for the office of relieving officer of the Godstone Union, in the county of Surrey; and, in pursuance and execution of the powers and authorities given in and by the statutes in that behalf made and provided, we do hereby remove him from the said office, and order

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and direct the said L. A. Teather to cease to exercise and perform the power and duties of the said office.

And we do hereby require the guardians of the poor of the said union, as soon as convenient may be, to appoint a fit and proper person to be a relieving officer of the said union, in the room of the said L. A. Teather; and to report the said appointment when made, together with the amount of the salary intended to be given to the person so to be appointed relieving officer as aforesaid, to the said poor law board.

Given under our hand and seal of office, this 14th of December, 1849.

M. T. BAINES, President.

GEO. NICHOLLS, Secretary.

The affidavit went on to state that the deponent had had no intimation from such poor law board of their intention to dismiss him, or of the cause thereof, prior to such order; nor had he had any opportunity afforded him to refute, or cause an investigation to be made into the cause of any complaints, if any, that such poor law board might have against him. That immediately on receiving such order, he forwarded by post a written notice to the poor law board, stating that he was not unfit for the office of relieving officer, that he considered such order illegal, and that he should appeal to this Court. That on the 12th of January, he sent another notice to the poor law commissioners, stating that he would apply to this Court on the first day of Term: and that he accordingly instructed counsel on that day to make the application. That during the whole time he held the situation of such relieving officer, he had diligently and faithfully discharged the duties of such office; and that he wholly denied the charge of unfitness in him to perform the duties of such relieving officer.

Wells. The question will turn upon the construction to

be put upon the power conferred by the Legislature on the poor law commissioners, by the 4 & 5 Wm. 4, c. 76. By sect. 15 of that act, the administration of relief to the poor is to be under the control of the commissioners, who are to make rules and regulations for the management of the poor, and the administration of the laws for their relief, &c. By the 46th section it is enacted, "that it shall be lawful for the said commissioners, as and when they shall see fit, by order under their hands and seal, to direct the overseers or guardians of any parish or union," "to appoint such paid officers with such qualifications as the said commissioners shall think necessary for superintending or assisting in the administration of the relief and employment of the poor," &c.; "and the said commissioners may and they are hereby empowered" to "direct the mode of the appointment and determine the continuance in office or dismissal of such officers," &c. And by the 48th section it is enacted, "that the said commissioners may and they are hereby authorized and empowered as and when they shall think proper, by order under their hands and seal, either upon or without any suggestion or complaint in that behalf from the overseers or guardians of any parish or union, to remove any master of any workhouse, or assistant overseer, or other paid officer of any parish or union whom they shall deem unfit or incompetent to discharge the duties of any such office," "whether such union shall have been made or such officer appointed before or after the passing of this act, and to require from time to time the persons competent in that behalf to appoint a fit and proper person in his room," &c. It is not meant to contend that the relieving officer of a union is not a paid officer within the meaning of that section; but the question will be, whether the poor law commissioners can, under this section, without alleging any reason, or any cause of complaint, and without calling on the party to answer or explain what may be deemed amiss in his conduct, remove an officer at once from his situation as unfit to discharge its duties; and it is submitted that

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they cannot do so. The Court will not interpret the powers conferred by the Legislature upon a public body as empowering them to act contrary to natural justice and equity, by dismissing their officers arbitrarily, without alleging any complaint, or instituting any inquiry. No doubt the statute constitutes them the sole judges of the unfitness or incompetency of paid poor law officers; but they are bound to ascertain that unfitness or incompetency according to the fixed rules of common sense and justice, which forbid that a man should be condemned unheard. It has been decided, that clergymen employed as chaplains at work-houses, are “paid officers” within the meaning of the above section; *Reg. v. The Guardians of the Poor of the Braintree Union* (a); yet the Legislature would hardly have intended that any of these gentlemen might be pronounced incompetent and unfit to discharge the duties of the office, without either inquiry or notice to the party. [*Erle, J.*—No doubt, the Legislature would not intend that a public body like the poor law commissioners would commit an act of injustice.] In the case cited, it is true, Lord *Denman*, in giving judgment, says, “We say nothing on the return, which merely offers reasons of expediency and policy against this particular exercise of discretion. Of such matters those to whom the discretion is confided are sole judges.” But, it is submitted, his Lordship is to be understood there as meaning only, that where the commissioners have properly instituted an inquiry, and decided the matter, this Court will not interfere with their discretion. [*Erle, J.*—Is it not notorious that some persons hold office *durante bene placito*, and that such persons may be removed without cause? Have you any authority for this application?] The nearest case is that of *Reg. v. Smith* (b). There, to a mandamus to a vicar to restore a parish clerk to his office, a return was made setting out misconduct on the part of the clerk, and justifying the removal on that ground;

(a) 1 Q. B. 130, 142.

(b) 5 Q. B. 614.

and it was held that the return was insufficient, for not shewing that the clerk had been summoned to answer for his conduct before removal. [*Erle*, J.—You will find that, in that case, the return made by the vicar only claimed the right to remove the clerk “for lawful cause.” A power to remove for cause is perfectly distinct from a power to remove at discretion. I recollect a case in this Court where it was held, on a return to a mandamus, that a schoolmaster, appointed under a charter, which rendered him removable at the discretion of the governors of the school, might be removed without summons or hearing (*a*).] [*Wells* referred also to *The Queen v. The Poor Law Commissioners. (Allstonefield Incorporation)* (*b*).]

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On the following day,

ERLE, J., delivered judgment.—There is no doubt that under the terms of the Poor Law Act, the commissioners have a discretionary power to remove any relieving officer of a poor law union from his office; and it is clear, that where there is the discretionary power in the commissioners to remove, they may remove without assigning grounds, or calling on the party to defend himself. If it were necessary to cite any authority for this position, an ample one will be found in the case of *Reg. v. The Governors of the Darlington School* (*c*). There will, therefore, be no rule.

Rule refused.

(*a*) His Lordship referred to 682.
the case of *Reg. v. The Governors* (*b*) 11 A. & E. 558.
of the Darlington School, 6 Q. B. (*c*) 6 Q. B. 682.



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January 18, 24.

Ex parte BOYNTON.

[*Bail Court. Coram Erle, J.*]

The caption of an order, adjudicating a party to be the father of a bastard child, stated that it was made "at a petty session of her Majesty's justices of the peace for the said riding," &c., "holden," &c., "before us, the Rev. F. S., clerk, and T. P. Esq., her Majesty's justices of the peace for the said riding, and a majority of the justices now present." The order was signed by F. S. and T. P. :
Held, on motion to quash the order which had been brought up by certiorari, that it must be taken in effect to state that F. S. and T. P. were justices of the peace, and a majority of those present.

PRENTICE moved to quash an order of petty sessions, which had been brought up into this Court by certiorari, adjudicating one Charles Boynton to be the putative father of a bastard child, and ordering him to pay the expenses of its maintenance.

The order was in the following form:—

| | |
|--|---|
| East Riding of Yorkshire, (to wit.) | } At a petty session of her Majesty's justices of the peace for the said riding, holden in and for the division of Dickering, in the said riding, at Bridlington, on the 22nd day of September, in the year of our Lord 1849, before us the Rev. Francis Simpson, Clerk, and Thomas Prickett, Esquire, her Majesty's justices of the peace for the said riding, and a majority of the justices now present: |
|--|---|

Whereas one Frances Ann Pinkney, single woman, residing at Bridlington, within this division, did, on the 4th day of September, in the year of our Lord 1849, having been delivered of a bastard child within twelve calendar months prior thereto, make application to Thomas Prickett, Esq., one of her Majesty's justices of the peace acting for this division, for a summons to be served upon one Charles Boynton, of Burton Agness, in the said riding, gentleman,

The order, which was made on the 22nd of September, 1849, recited that a summons had been issued "to appear on the 15th day of September instant," "and whereas the said C. B. having been duly served with the said summons within forty days from the said 15th day of September instant, from which day the hearing of this case hath been adjourned, and now appearing in pursuance thereof by G. H. his attorney, and the said F. A. P." (the mother) "having now applied to us:" *Held*, that it was no defect that the order did not state that the summons was served before the 15th day of September, or that the parties appeared on that day so as to authorize an adjournment to the 22nd; as it was stated that the defendant was duly served with the summons, and that he appeared by attorney at the hearing on the 22nd. *Held* also, that it sufficiently appeared that the application for the order was within forty days of the service of the summons.

The order recited that the justices had heard "all the evidence on oath tendered on behalf of the said C. B.:" *Held* sufficient.

whom she alleged to be the father of the said child, and the said justice thereupon issued his summons to the said Charles Boynton to appear at a petty sessions to be holden on the 15th day of September instant for this division, in which the said justice usually acts, to answer her complaint touching the premises:

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And whereas the said Charles Boynton having been duly served with the said summons within forty days from the said 15th day of September instant, from which day the hearing of this case hath been adjourned, and now appearing in pursuance thereof by George Hodgson, his attorney, and the said Frances Ann Pinkney having now applied to us, the justices in petty session assembled, for an order upon the said Charles Boynton, according to the form of the statute in such case made and provided, and it being now proved to us, in the presence and hearing of the said George Hodgson, as such attorney as aforesaid, that the said child was, since the passing of an act passed in the eighth year of the reign of her present Majesty, intituled "An Act for the further amendment of the Laws relating to the Poor in England," that is to say, on the 17th day of November, in the year of our Lord 1848, born a bastard of the body of the said Frances Ann Pinkney:

And we having, in the presence and hearing of the said George Hodgson, as such attorney as aforesaid, heard the evidence on oath of such woman, and such other evidence as she hath produced, and having also heard all the evidence on oath tendered on behalf of the said Charles Boynton, and the evidence of the said Frances Ann Pinkney, the mother of the said child, having been corroborated on oath in some material particular by other testimony to our satisfaction, do hereby adjudge the said Charles Boynton to be the putative father of the said bastard child, and having regard to all the circumstances of this case, we do now hereby order that the said Charles Boynton do pay unto the said Frances Ann Pinkney, the mother of the said bastard child, so long as she shall live and be of sound mind, and shall not be in any gaol or prison, or under

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sentence of transportation, or to the person who may be appointed to have the custody of such bastard child, the sum of two shillings and sixpence per week, from the said 4th day of September instant, being the day upon which such application was made to the said justice as aforesaid, until the said child shall attain the age of thirteen years, or shall die, or the said Frances Ann Pinkney shall marry: and we do hereby further order the said Charles Boynton to pay to the said Frances Ann Pinkney the sum of nineteen shillings, being costs incurred in obtaining this order; and the sum of ten shillings for the midwife.

Given under our hands and seals, at the session aforesaid.

FRANCIS SIMPSON, (L. s.)

THOMAS PRICKETT, (L. s.)

Prentice. The order is bad on the face of it. It purports to be made "at a petty session of her Majesty's justices of the peace," &c., "holden," &c., "before us the Rev. Francis Simpson, clerk, and Thomas Prickett, Esq., her Majesty's justices of the peace for the said riding, and a majority of the justices now present," and is only signed by Mr. Simpson and Mr. Prickett. It should have been signed by a majority of the justices present, or it should be shewn that the justices signing were such majority. The order is made under the 7 & 8 Vict. c. 101, s. 2; and the form given in the schedule to the subsequent act, 8 & 9 Vict. c. 10, contains no such words as "and a majority of the justices now present." [*Erle, J.*—An order like the present is valid, if made by two justices.] Yes; but not where it appears that there were other justices present at the session forming a majority, by whom the order was not signed. The title of the order should have shewn who were present, and it would then have appeared by the signature of the order whether it was signed by a majority. Another objection is, that the summons is to appear on the 15th day of September instant, and the order does not state that he was served with the summons before that day, or that he appeared on that day. Neither party is stated

to have appeared on the day named in the summons, and, unless they did appear, there was no power in the sessions to adjourn to the 22nd of September. A third objection is, that by the 7 & 8 Vict. c. 101, s. 4, "no such order shall be made unless applied for at such petty sessions within the space of forty days from the service of the summons after the birth of the bastard child on the person alleged to be the father of such child." Here the order only states that the father was served with the summons within forty days "from the said 15th of September;" and shews upon the face of it that the real application for the order was not till the 22nd. [*Erle, J.*—It states that "the hearing of this case hath been adjourned" from the 15th of September; the adjournment of the hearing must be the adjournment of the application.] A fourth objection is, that the order states that the sessions heard all the evidence on oath tendered on behalf of the said Charles Boynton, and it may be true, and yet that they refused to hear documentary evidence which was not on oath.

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ERLE, J.—The first objection is, that the order, which is stated to be made at a sessions holden before us, A. B. and C. D., justices of the peace, "and a majority of the justices now present," may have been made by A. B. and C. D. without the concurrence of the majority; but it appears to me, that A. B. and C. D. are in effect stated to be both justices of the peace and a majority of those present.

The next objection is, that the summons is not stated to have been served before the 15th of September, the day for appearance, nor that either of the parties appeared on that day so as to authorize an adjournment to the 22nd; but as it is stated that the defendant was duly served with the summons, and that he appeared by attorney at the hearing on the 22nd, I am of opinion that there was no ground for presuming that the summons had not been duly served, and if that fact had been left in doubt, the defect would have been cured by an appearance at the hearing.

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The remaining objection is, that the evidence is stated to have been "on oath," and may have been partly documentary; but documentary evidence is founded on the oath of a witness who makes it admissible, and this objection also fails.

Rule refused.

Ex parte PARDY.

January 24, 25.

[*Bail Court. Coram Erle, J.*]

A warrant of commitment made under the 99th and 102nd sections of the County Courts' Act (9 & 10 Vict. c. 95), stated that the party was examined, and that he "did not attend" at the Court at the appointed time, "or allege any sufficient excuse for not attending;" and that it appeared to

PARRY moved for a habeas corpus to bring up the body of John Stephen Pardy, a prisoner in Whitecross Street prison, under a warrant of commitment of the Judge of the Bloomsbury County Court of Middlesex, in order that he might be discharged out of custody.

It appeared that a person of the name of Cubitt, on the 11th of January, 1849, had recovered a judgment against Pardy, by the name of Purdy, in the Bloomsbury County Court of Middlesex, for a sum of 20*l.* with 4*l.* 19*s.* costs, which Pardy was ordered to pay forthwith. That on the 18th of January, the defendant not having complied with the order, the Judge made an order for his commitment under the

the Court that he had obtained credit from the plaintiff under false pretences;" and "had made a gift, delivery, or transfer of property, with intent to defraud his creditors;" and required the gaoler to keep him in prison "for the term of forty days from the arrest under this warrant, or until he shall be sooner discharged by due course of law." *Held*, on motion for a habeas corpus, that the warrant of commitment being partly in the nature of a civil proceeding, was not bad for not stating that the examination was "upon oath," or for shewing two offences; or for uncertainty in the description of the offence; or for requiring him to be kept in prison for forty days, or until he should be sooner discharged by due course of law.

On the 11th of January, 1849, a judgment was recovered against a party in the County Court for a debt which he was ordered to pay forthwith. On the 12th of the same month he was arrested for debt, and on the 15th he petitioned the Insolvent Court. On the 17th a vesting order was made, and he filed his schedule, in which the debt recovered by the plaintiff in the County Court was inserted. On the 18th, the judgment debt not then having been paid, the County Court made an order for his commitment under the 99th section of the County Courts' Act. On the 2nd of April, the Insolvent Court ordered his discharge as to all debts existing on the 17th of January, and inserted in his schedule. On the 11th of January, 1850, a warrant of commitment, founded on the order of the County Court of the 18th of January, 1849, was issued, under which he was taken into custody. *Semble*, that the discharge by the Insolvent Court freed the defendant from all liability in respect of the debt recovered by the judgment of the County Court. *Quære*, whether the defendant was not bound to apply to the Judge of the County Court in the first instance for his discharge?

99th section of the County Courts Act (9 & 10 Vict. c. 95), upon which order the present warrant of commitment was founded. The warrant bore date the 11th of January, 1850, and was in the following form:—

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In the Bloomsbury County Court of Middlesex, holden at Berner Street, Oxford Street, in the said county,

Between HENRY ARCHIBALD CUBITT, Plaintiff,

and

JOHN PURDY, Defendant.

To the High Bailiff and other Bailiffs of the said Court, and all constables and peace officers within the jurisdiction of the said Court, and to the governor of the debtors' prison, at Whitecross Street, in the said county :

Whereas at a Court holden at the Court-house in Berner Street aforesaid, on the 11th day of January, in the year of our Lord 1849, the above named plaintiff, by the judgment of the said Court in a certain suit wherein the said Court had jurisdiction, recovered against the above named defendant the sum of 20*l.* for his debt, together with the sum of 4*l.* 19*s.* the costs of the said suit ; and thereupon it was then and there ordered by the said Court that the said defendant should pay forthwith to the said plaintiff the sums of 20*l.* and 4*l.* 19*s.* recovered against the said defendant :

And whereas the said defendant having personally appeared to the *said* (a) summons, and being present in Court, and having then neglected and refused to pay the said sums so recovered, was, upon the application of the said plaintiff, then and there examined touching his estate and effects, and the manner and circumstances under which he contracted the said debt, which was the subject of the action in which the said judgment was obtained against him, and as to the means and expectation he then had, and as to the property and means which he still had, of discharging the said debt and costs, and as to the disposal he had made of any property :

(a) *Sic.*

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And whereas it appeared, upon such examination, to the Judge of the said Court, that the said defendant had obtained credit from the plaintiff under false pretences, and had made a gift, delivery, or transfer of property with intent to defraud his creditors; but the said defendant then requested to be allowed time to produce certain evidence, and upon his the said defendant's application the Judge of the said Court granted time to the said defendant until the 18th day of January, 1849, and postponed and adjourned making any order, or otherwise adjudicating in respect of the said examination until the said 18th day of January, 1849:

And whereas a Court was duly holden by the said Judge at the said Court-house in Berner Street aforesaid, on the said 18th day of January, 1849, and the said defendant did not attend at such last mentioned Court, or allege any sufficient excuse for not attending, and did not at such Court produce any evidence or allege any sufficient excuse for the non-production of such evidence:

And whereas it then appeared to the satisfaction of the Judge of the said Court that the said defendant had obtained credit from the plaintiff under false pretences, and had made a gift, delivery, or transfer of property with intent to defraud his creditors, and thereupon the said Judge of the said Court, by a certain order bearing date the 18th day of January, 1849, did order and adjudge the said defendant to be committed for the term of forty days to the debtors' prison at Whitecross Street, in the said county, or until he should be discharged by due course of law:

These are thereupon to require you, the said high bailiff, bailiffs, and others, to take the said defendant and to deliver him to the govèrnor of the debtors' prison at Whitecross Street aforesaid; and you, the said governor, are hereby required to receive the said defendant, and him safely to keep in the said prison for the term of forty days from the arrest under this warrant, or until he shall be

sooner discharged by due course of law. For which this shall be your sufficient warrant.

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Given this 11th day of January, 1850.

(Seal.)

A. B., Clerk of the said Court.

It also appeared upon the affidavit in support of the application, that Pardy was arrested for debt on the 12th of January, 1849; that on the 15th of the same month he petitioned the Court for the relief of insolvent debtors; and that he filed a schedule of his debts, among which he inserted the debt and costs due to Cubitt upon the judgment. That on the 17th of the same month, a vesting order was made. That on the 2nd of April in the same year, the Insolvent Court made an order adjudging and ordering that he should be discharged out of custody, and entitled to the benefit of the act forthwith, as to all the debts and sums of money due or claimed to be due on the 17th of January, 1849, and set forth in the insolvent's schedule; and that he was arrested upon the above warrant on the 17th of January, 1850.

Parry. The defendant was discharged from all liabilities in respect of this debt under the 1 & 2 Vict. c. 110, ss. 90 and 91. Sect. 90 enacts, "that no person who shall have become entitled to the benefit of this act by any such adjudication as aforesaid shall at any time thereafter be imprisoned," for debts, &c., to which the adjudication extends; and that "upon every arrest or detainer in prison upon any such judgment so entered up as aforesaid, or for or by reason of any such debt or sum of money or costs, or judgment, decree, or order for payment of the same, it shall be lawful for any Judge of the Court from which any process shall have issued in respect thereof," &c., "to release such prisoner from custody," &c. [*Erle, J.*—Ought not your application, under this section, to be to the Judge of the County Court in the first instance?] Where a party

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is illegally imprisoned, he has a right to come to this Court, to ask to be discharged. The proviso in the 102nd section of the County Court Act (9 & 10 Vict. c. 45), which says, that "no protection, order, or certificate granted by any Court of bankruptcy, or for the relief of insolvent debtors, shall be available, to discharge any defendant from any commitment," under a warrant of commitment like the present, does not apply to cases where the protection is granted before the commitment. The warrant is bad on the face of it. It is in the nature of a conviction, and is, therefore, to be construed strictly. According to the 98th section, the examination is to be "upon oath;" and if the party refuse to be sworn, he may, by the 99th section, be committed for that cause. Here, it does not appear that the examination was upon oath, and, therefore, in conformity with the terms of the statute; and nothing will be intended in favour of the commitment. Nor does it appear, except by inference, that any summons had been issued, and that the Judge, therefore, had any jurisdiction. [*Erle, J.*—Is there not a warrant of commitment given amongst the forms settled by the Judges under the County Courts' Act?] Yes, but although that form contains similar defects, it has not been followed throughout in the present instance. [*Erle, J.*—I think I must hold that the power is properly exercised without setting out proceedings which are wholly of a civil nature.] Another defect is, that the warrant states two offences to have been committed, and only one punishment awarded, and it does not appear in respect of which it is awarded. It says, whereas the defendant "did not attend" at the Court, "or allege any sufficient excuse for not attending;" which is one offence, under the 99th section; and then that "it there appeared to the satisfaction of the Judge of the said Court that the said defendant had obtained credit from the plaintiff under false pretences," which is another and separate offence under the same section. [*Erle, J.*—I do not see how the defendant can object to the warrant, that having committed two offences,

he has only been sentenced to forty days imprisonment for one, instead of forty days for each.] In *Newman v. Bendyshe* (a), a conviction under the 14th sect. of stat. 11 Geo. 4 & 1 Wm. 4, c. 64 (for the general sale of beer, &c.), which charged the party with the offence of keeping his house open for the sale of beer and selling beer, and suffering the same to be drunk and consumed in the house at an unlawful time, and convicted him in a penalty of 40s. as for a single offence, was held bad, as charging more than one distinct offence. [*Erle, J.*—If the warrant of committal now under consideration were in the nature of a conviction it might be bad, but it is in the nature of a civil execution, for the defendant may at any time pay the debt and costs, and release himself from the consequences of his refusal or neglect to pay. There is another distinction from the case cited; there the party might have been sentenced to a penalty of 40s. for each offence; here he could not be imprisoned for more than forty days.] Another objection to the warrant is, that it describes the offence in an uncertain manner: it says, that the defendant “had made a gift, delivery, *or* transfer;” so that it might be either one of the three; and a defendant has a right to know on what charge it is that he is imprisoned. The warrant is also bad for requiring the gaoler to keep the defendant in the said prison for the term of forty days from the arrest, under this warrant, “or until he shall be sooner discharged by due course of law.” It should have stated, “or until he shall pay the debt and costs,” &c., so that the gaoler might know when he was entitled to discharge him. [*Erle, J.*—The gaoler is bound to know when he ought to discharge him.] It has been held in cases of convictions, where the statute leaves the magistrates the discretion of distributing the penalty, that a conviction is bad, if it does not state what portion is to be paid to the informer or party grieved; so that the party may know what he is to do, in order to get

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(a) 10 A. & E. 11; S. C. 2 P. & D. 340.

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discharged (*a*). In *Boddington v. Woodley* (*b*), an order to detain a defendant, under the 1 & 2 Vict. c. 110, s. 7, until he should give bail for 3000*l*., “or till further order,” was held bad. [*Erle*, J.—There the words “till further order” imposed a condition upon the defendant’s term of detainer which the statute did not warrant.]

Cur. adv. vult.

On the following day,

ERLE, J., delivered judgment.—Upon consideration, I entertain the opinion that I did during the argument, that this warrant of commitment is valid, and that the objections which have been urged against it cannot be sustained: for I look at it in the light of partly a civil and partly a penal proceeding. I am inclined, however, at the same time to think, that taking the facts as stated, the discharge by the Insolvent Court freed the defendant from all liability in respect of the debt recovered by the judgment of the County Court. But, inasmuch as if the gaoler were to return the present warrant of commitment, which is a valid one, to a writ of habeas corpus, it would be a sufficient answer on this part, I am of opinion that the writ ought not to go, and that this application must consequently be refused.

Rule refused (*c*).

(*a*) See *Burn’s Just.* tit. “Conviction,” (IV.) p. 996, 7. 29th ed.

(*b*) 8 A. & E. 925; S. C. 1 P. & D. 159.

(*c*) *Parry* then asked for, and obtained a rule, calling on the plaintiff to shew cause why the

defendant should not be discharged out of custody, but the rule was never drawn up. See a subsequent application in this case to the Court of Common Pleas, *post*, p. 118.



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CORY and Another v. HOTSON.

January 25.

[*Bail Court. Coram Erle, J.*]

T. W. SAUNDERS moved to set aside the trial, verdict, and all subsequent proceedings in this cause, on the ground of irregularity.

It appeared upon the affidavits, that issue having been joined in the cause on the 30th of October, 1849, notice of trial was given for the second sittings in Michaelmas Term in Middlesex, and continued to the third sittings in the same Term; and afterwards continued to the sittings after Term. On the 24th of November, a fresh notice of continuance to the first sittings in Hilary Term was given in the ordinary form. And on the 10th of January, 1850, a notice of continuance to the second sittings in Hilary Term was given; at which second sittings the cause was tried as undefended, no one appearing on behalf of the defendant.

After notice of trial and continuance once in the Term, the plaintiffs gave a fresh notice of continuance in the ordinary form on the last day but one of the Term, to the first sittings in the following Term: *Held*, that the time intervening between the Terms being sufficient to enable the plaintiff to give an original notice of trial, and no particular form of words being necessary to constitute a valid notice of trial, the notice of continuance so given might operate as a good original notice of trial, whereupon to found a subsequent notice of continuance given in the following Term.

T. W. Saunders. The notices of continuance were all irregular except the first. A notice of trial can only be continued once in a Term; 1 *Archb. Pract.*, 295, 8th ed.; *Wyatt v. Stocken* (a). [*Erle, J.*—That may be so; but why should not the notice of the 24th of November, being given in time sufficient to make it a good original notice, operate as such? It has been held, that where the time intervening between the service of the notice by continuance and the sittings to which the original notice is thereby continued, was sufficient to give a full notice of trial, the Court will deem such notice an original or new notice of trial (b).] Yes; but a distinction is drawn between cases

(a) 6 A. & E. 803.

292; *Tyte v. Steventon*, 2 W. Bl.

(b) *Boyes v. Twist*, Barnes, 1298.

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in which the notice sought to be continued is valid, and those in which it is not; the notice of continuance in the latter case being held to be good as an original notice, whilst in the former it is not. In *Wyatt v. Stocken* (a) it was held, that where a valid notice of trial had been given, and then a continuance of that notice, the plaintiff could not treat the latter as an original notice and continue it in the same Term, though it was given in time sufficient to have made it a good original notice. Here the notice of trial was a valid notice.

ERLE, J.—In the case cited, there had been a continuance of a valid notice, and it was attempted to make a second continuance, in the same Term, effectual, by construing the first continuance as an original notice, which could not be done. Besides, there the notice of continuance was not given in sufficient time to operate as an original notice of trial unless the defendant had been under terms to accept short notice of trial. Here the notice of continuance of the 24th of November is given for the first sittings in the following term; in sufficient time, therefore, to have been good as an original notice of trial. Now, as no particular form of words is necessary in order to constitute a good notice of trial, but only that it should clearly inform the party in sufficient time when and where the cause is to be tried; and, as there was no pretence for saying that the defendant was misled by the notice in this case, I think I must take the notice of the 24th of November to be valid as an original notice of trial for the first sittings in the present Term; the notice of continuance to the second sittings, when the cause was tried, would therefore be good; and the proceedings perfectly regular. There will be no rule.

Rule refused.

(a) 6 A. & E. 803.

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January 25.

In re an Arbitration,
Between THEOPHILUS BARTLETT GODDARD,
and
JOHN MANSFIELD.

[*Bail Court. Coram Erle, J.*]

A RULE had been obtained in Michaelmas Term last, calling upon John Mansfield to shew cause why the award or umpirage made between the parties herein should not be set aside on the following grounds: first, that the umpire had exceeded his authority in ordering mutual releases on certain future events as mentioned in the award, and in respect of all claims and demands, without confining such releases to claims and demands existing at the date of the submission. Secondly, that it was uncertain to what claims and demands and up to what time the releases were to extend. Thirdly, that the umpire had no power to reserve or delegate authority to John Edward Parr, Esq., to settle such releases, or to award releases to be settled by a third party, or to award that they should be settled by the said J. E. Parr, Esq. Fourthly, that the umpire had no power to deal and make arrangements as he had done with the bills and accounts mentioned in the said award, and with

On a reference of all matters in difference between the parties, the umpire ordered G. to pay to M., on a balance of accounts, a certain sum, and that "mutual releases of all claims and demands whatsoever," should be executed, and in case of any dispute arising as to the form of such releases, that they should be settled by J. P.

Quere, on motion to set aside the award, whether the direction

that they should be settled by J. P. was bad? but *held* that that part might be separated from the rest of the award, which was good. *Held* also, that the umpire had power to award mutual releases of all claims and demands existing at the time of, and referred by, the submission; although there was no express power to that effect contained in the submission; and that the award of releases as to any other claims, &c., was void: but that even if he had no such power, that portion of the award was separable from the rest, which might stand as good.

M. was engaged to build a ship, of which G. was part owner and ship's husband. Disputes having arisen between them, "all matters in difference" between them were referred to arbitration. When the parties were before the umpire, G. offered to pay certain bills due for materials for the ship, and for which M. was primarily liable, and requested the arbitrator to deduct the amount from the sum to be found as owing from him to M. The umpire accordingly deducted the amount, and made his award for the balance, and ordered that G. should remain solely liable for the payment of these bills, and should give, if required, a bond of indemnity in respect of them to M. *Held*, on motion to set aside the award, that G. could not, after having requested the umpire to make the deduction, object that it was not a matter in difference, and that he had no authority. *Held* also, that the award of the bond of indemnity, if bad, was clearly separable from the rest, and might be rejected as surplusage.

Semble, that the umpire had power to order a bond of indemnity to be given.

On a rule to set aside an award, if any part of the award be bad, but can be clearly separated from the rest, and treated as surplusage, the rule will be discharged generally.

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future rights and liabilities in respect of the same, or to include the same in the balance of the accounts, or to award that the said T. B. Goddard should remain, and be solely liable to the same, or to interfere with or affect the liability of the said T. B. Goddard, with reference to the other shareholders in the ship. And fifthly, that the umpire had no power to order a bond of indemnity as he had done, and that the amount of such bond ought to have been specified.

It appeared upon the affidavit upon which the rule had been obtained, that Mansfield was a shipbuilder at Lyme Regis, in the county of Dorset, and that he had been for some time employed by certain parties to build a ship, for which Goddard, as one of the part owners, acted as ship's husband. That various materials and things were ordered for the ship entirely by Mansfield. That on the 27th of August, 1849, by a deed of submission, after reciting that "certain disputes" had arisen between Goddard and Mansfield, and that it had been arranged "that the said disputes and all matters in difference between the said parties, should be settled by arbitration;" it was agreed "that the said disputes and all matters in difference between the said parties should be referred to the award, order, arbitrament, final end, and determination of J. D., of," &c., "or to an umpire to be appointed by him;" "the costs of the reference and award to be in the discretion of the arbitrator." The submission contained the usual clauses, but no power to order any bond of indemnity to be given by either party. An umpire was appointed, by whom the award was made on the 25th of October, 1849.

The award, after reciting the deed of submission, and the appointment of the umpire, proceeded as follows:—

"I do find and award that there is justly due and owing from the said Theophilus Bartlett Goddard to the said John Mansfield the sum of 200*l.* 16*s.* 5*d.* upon a balance of all accounts submitted to me between the said parties. And I do also award, order and direct that the said sum of 200*l.* 16*s.* 6*d.* shall be paid by the said T. B. Goddard to

the said John Mansfield, on or before the 1st day of December next, and that upon such payment being made, and also upon payment by the said T. B. Goddard of the several sums of money hereinafter mentioned, mutual releases of all claims and demands whatsoever shall, if required, be made and executed by each of them the said T. B. Goddard and John Mansfield, to the other of them, and that the form of such mutual releases shall be finally settled by Mr. John Edward Parr, of the Temple, London, as counsel between the said parties, in case they shall differ and dispute about the same, and that the expenses of any such release shall be borne and paid by such of the parties as shall require the same.

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“ And I do further order, award and determine, that the said T. B. Goddard shall remain and be solely liable for the payment and discharge of, and, on being required by the said John Mansfield so to do, shall, by bond at his own expense, well and effectually indemnify and save harmless the said John Mansfield from and against all claim, demand and liability whatsoever, for or in respect of the payment of the several bills and accounts following; the same respectively being sums of money for which I have given the said T. B. Goddard credit in his said account, leaving the balance of the said award of 216*l.* 0*s.* 5*d.*, which I have found and awarded to be due from and to be paid by the said T. B. Goddard to the said J. Mansfield, in manner aforesaid, that is to say,” &c. Then followed a statement of the names of several parties, together with the nature of the work done, and the materials supplied by them for the ship, and the amount of their respective bills, which, added up, came to 796*l.* 0*s.* 11*d.*

There was also an affidavit by Goddard's attorney, alleging that the several bills and accounts mentioned in the award, for the payment and discharge of which the umpire had awarded and determined that the said Goddard should remain and be solely liable, &c., were bills for work done, and materials supplied for the said

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ship, and for fitting out the same, and for which the said Goddard was only liable as one of the shareholders of the said ship.

The affidavits in answer were made by the umpire, and the arbitrator. The former stated that, when the parties were before him, an account in writing, annexed to the affidavit, was delivered to him by Goddard, who said, "that the account between Mansfield and himself was now much simplified, as he had given credit for outstanding bills due, amounting to 796*l.* 0*s.* 11*d.*, and which he would undertake to discharge, and that the deduction of such bills would reduce his demand on the said John Mansfield to the sum of 454*l.*, subject to the award. That Goddard afterwards produced the said several bills of Messrs. Whittway and Co., Messrs. Woods and Co., &c. (being the parties mentioned in the award), and whose accounts amounted in the whole to 796*l.* 0*s.* 11*d.*, which he, the umpire, examined, and in consequence of the undertaking so made and given by the said Theophilus Bartlett Goddard, he, in taking and making up the account between them, gave the said Theophilus Bartlett Goddard credit for the same, which reduced the balance due from the said Theophilus Bartlett Goddard to the said John Mansfield to the sum of 216*l.* 0*s.* 5*d.* The affidavit of the arbitrator stated, that he was present when the umpire entered on the arbitration and umpirage, at which time Goddard, who was also present, undertook to pay the bills due for the outfitting the vessel, being the bills mentioned in the award. That Goddard then stated that the account between Mansfield and himself was now much simplified, as he had given credit for the above bills, which he would undertake to discharge and save the said Mansfield harmless therefrom. That since the award Goddard had discharged several of the above bills.

Stock now shewed cause. 'There is no sufficient ground for setting aside the award. As to the objections that the

umpire had no power to order mutual releases or a bond of indemnity to be executed, it is submitted that the umpire had ample authority under the general terms of the submission to do so, although no specific power to that effect was conferred upon him by the deed of submission. In *Ingram and Others v. Milnes* (a), the submission was of all matters in difference between the parties, but contained no power to award a release; and an award directing a sum to be paid by the defendant to the plaintiff, and that the plaintiff should execute a release to the defendant of all claims in respect of that sum, was held good. [*Erle*, J.—I have always considered that an award of mutual releases in respect of the matters submitted, is nothing more than carrying out to their fullest extent the terms of the reference]. In *Cooke v. Whorwood* (b), an award that one of the parties should be bound in a bond to the other for the payment of the sum awarded, was held good, although it would seem that the submission was only of matters in dispute touching certain arrears of rent, and contained only the usual clauses. In a note to that case (c), it is said, “So where upon a reference of a cause and all matters in difference between the plaintiff and defendant, the main question was, which of them should pay the expenses of a ship, in which they had been jointly interested, incurred after March 24, 1838; and the arbitrator directed the plaintiff to pay them and to give the defendant a bond of indemnity against the payment of such expenses; it was held (*Maule*, J. dubitante) that the award was good: and the principal case was cited and relied on by *Tindal*, C. J. and *Bosanquet*, J.” The case of *Brown v. Watson* (d) is the one thus referred to. In *Brown v. Watson*, a case of *Philips v. Knightly* (e) was relied on, as shewing that the arbitrator had power to direct a bond to be given. Nor is it any defect that the amount of such bond is not specified,

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(a) 8 East, 445.

(b) 2 Wms. Saund. 337.

(c) Id. p. 337, n. (a), 6th ed.

(d) 6 Bing. N. C. 118; S. C.

8 Scott, 386; 8 Dowl. 22.

(e) 2 Stra. 903.

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as it must be taken to be for a reasonable sum for that purpose. It is not, however, denied that some doubt may exist whether this award can be supported in all its parts; but it is submitted, that those parts which are doubtful may be separated from the rest, and the award remain voidable only pro tanto. Thus, the direction that the form of the mutual releases shall be settled by a counsel named, may be, perhaps, beyond the authority of the umpire, but being separable and distinct from the valid part of the award, may be treated as mere surplusage. So the award of mutual releases "of all claims and demands whatsoever," is void as to all claims and demands not existing at the time of, and not submitted by, the reference; *Pickering v. Watson* (a). In that case, it was held that an award of general releases on a special reference was good for the matters referred, and void as to the rest. There *De Grey*, C. J., in delivering judgment says, "I am of opinion that the first award may be supported, either, first, by construing the release therein directed to be only so far good, as falls within the authority of the arbitrators, and rejecting the rest. Or if the release be supposed to be one entire thing, and not to be rejected in part, then by rejecting it in toto." And *Blackstone*, J., says, "Supposing all that relates to releases in the present award was rejected, it would make no difference; for special releases after an award made are useless and superfluous. The award itself is equivalent to such special release, and may be pleaded to any action brought upon the same account." In *Tandy v. Tandy* (b), the arbitrator reserved to himself by his award a right, in case disputes should arise as to the form of certain conveyances which he directed to be executed, to appoint counsel to settle the form of the deeds; and the Court held the award on that account void. There, however, the case was decided upon the ground that the matter upon which the arbitrator had exceeded his authority could not be separated, so as to leave

(a) 2 W. Bl. 1117, 8. 1120.

(b) 9 Dowl. 1044.

the rest of the award untouched. *Bradshaw v. The East and West India Docks and Birmingham Railway Company*, referred to in *Russell on Awards*, p. 635, is also an authority in favour of this award. In *Kendrick v. Davies* (a), the arbitrator directed mutual releases in respect of a sum over which he had no jurisdiction, as well as in respect of one over which he had; and it was held that the award was good as to the latter, and void as to the former. In *Manser v. Heaver* (b), the arbitrator directed the verdict to be entered for the plaintiff, and certain works to be performed by the defendant; and that if the plaintiff were dissatisfied with the manner in which the works were performed, he might bring evidence before the arbitrator, who reserved to himself the power of making a further award in the matter. And the Court held, that although the latter part of the award was bad, the former part was final, and might stand. So where, upon a reference of an action of ejectment, the arbitrator, without any power expressly reserved by the rule of reference, awarded, amongst other things, that the parties should execute general mutual releases; it was held, that even if the award were bad as to the releases, that would not vitiate the whole award; *Doe d. Williams v. Richardson* (c). There *Richardson, J.*, says, "It may be understood, if necessary, that the releases directed, mean releases of all matters relating to the matters in the submission to reference; but if that part be bad, it cannot vitiate the whole award." In like manner, the award that Goddard should "remain and be solely liable" for the sums for which the arbitrator had given him credit in the account as having paid, is void as to that part only, and not as to the whole award. Besides, it appears upon the affidavits that Goddard had consented to submit the accounts when before the arbitrator, and he cannot, therefore, now be heard to set it aside on this ground. This award may therefore be supported, either on

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(a) 5 Dowl. 693.

(b) 3 B. & Ad. 295.

(c) 8 Taunt. 697, 8.

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the ground that the arbitrator was justified in ordering mutual releases and a bond of indemnity to be given, or on the ground that those portions of the award which are objected to, may be separated from the undoubtedly valid part of the award, and the latter stand good.

Bovill, in support of the rule. It has been conceded, that so much of the award as orders the form of the mutual releases to be settled by Mr. Parr is bad ; and, it is submitted, that that part cannot be separated from the rest ; and that even if it could, the award of mutual releases is an excess of authority, which renders the award bad. In *Pickering v. Watson* (a), it seems to have been admitted that the award of mutual releases was good as to part ; and the only dispute was, as to whether it could stand as to that part, although invalid as to the rest. In *Ingram v. Milnes* (b), the point as to the authority of the arbitrator to award mutual releases was never raised. The same remark applies to the case of *Kendrick v. Davies* (c). In *Cooke v. Whorwood* (d), the terms of the submission do not anywhere appear. As to the accounts for which the award finds that Goddard is to stand solely liable,—if the parties agreed to submit them when before the umpire, as would appear from the affidavits in support of this rule, there would, perhaps, have been no objection to the umpire's awarding that Goddard should pay the sum agreed on to be due, partly to Mansfield, and partly to the parties whom Mansfield had employed : but the arbitrator has gone further, and decided that Goddard shall be solely liable for these sums, and thus has affected the rights of third parties. [*Erle*, J.—It surely means as between him and Mansfield only.] At any rate, he had no power to award a bond of indemnity to be given ; as it was not a matter in dispute, whether Goddard should indemnify Mansfield against these claims.

(a) 2 W. Bl. 1117.
(b) 8 East, 445.

(c) 5 Dowl. 693.
(d) 2 Wms. Saund. 337.

There is no case to shew that an arbitrator may, of his own authority, direct a bond of indemnity to be given. In the case of *Brown v. Watson* (a), which has been referred to, a decision on the point was not necessary; and the opinions expressed by some of the learned Judges were founded on the authority of two former cases. Mr. Justice *Maule* there says, in giving judgment, "Upon the point of the bond I do not feel so clear; but it is the less material, as, if the objection were allowed to prevail, the award would only be bad pro tanto. I think the arbitrators might order a bond for money to be paid at a certain day; but that it is not necessarily within their powers to order a bond indemnifying a party against sums to be paid to others." In *Ross v. Boards* (b), it was referred to an arbitrator to settle all questions between the parties on an agreement for the sale of land; and the arbitrator awarded that B. should convey to A. the title to the land contained in two abstracts given in evidence on the arbitration, and ordered that B. should execute an indemnity bond to A., to be forfeited if A. should be evicted by reason of defect in the title; and that on execution of the premises A. should pay the purchase money: and upon motion the award was set aside, as not finally determining the questions referred. Lord *Denman*, in giving judgment in this case, says, "He" (the arbitrator) "leaves it in doubt whether the title is good or bad, and, in effect, orders that it shall be taken with all its faults. The doubt is rendered stronger by the direction that an indemnity bond shall be executed, which is more than the arbitrator had a right to order." It has, however, been urged, that the portions of the award objected to may be rejected altogether, and the award stand good for the rest. It is submitted, that the safest rule, in cases like the present, is to hold the whole award bad. In *Tomlin v. The Mayor of Fordwich* (c), the arbitrator awarded, that if the

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(a) 6 Bing. N. C. 118, 123; (c) 5 A. & E. 147, 152; S. C. S. C. 8 Scott, 386; 8 Dowl. 22. 6 N. & M. 594.

(b) 8 A. & E. 290, 294.

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defendant would put the premises into tenantable repair, to the satisfaction of M., and on a later day named execute a lease to the plaintiff, containing a covenant by plaintiff to keep in repair, the plaintiff should accept a lease on those terms, and execute a counterpart; and it was held, that the award was bad as to the delegation to M., and that that part was not separable from the rest of the award. There Lord *Denman*, C. J., in delivering judgment, says, "I always find a difficulty in separating the good part of an award from the bad. The arbitrator probably frames one part with a view to the other; and each may be varied by the view which he takes of the whole." In *Manser v. Heaver* (a), the award disposed of the matters referred, and then went on to order, that if the plaintiff were dissatisfied with the way in which the defendant performed the award, he might bring evidence before the arbitrator, who reserved to himself the right of making the award. In that case, there was a good award, and the excess of authority was distinct and clearly separable from the award. In *Doe d. Williams v. Richardson* (b), there was a distinct determination upon the matters submitted; and the releases were considered as clearly divisible from the rest of the award. In *Tandy v. Tandy* (c), Mr. Justice *Coleridge*, in giving judgment, says, "It is certain that, if an arbitrator exceeds his authority, it will make the award bad; but if the matter in which he exceeds his authority can be separated, so as to leave the rest of the award untouched, the remainder of the award may stand good. If, however, the excess of authority overrides the whole of the award, it cannot be sustained." It cannot be said in the present case, that the award of mutual releases was immaterial; and, if so, it may have weighed with the arbitrator in making his award, and cannot, therefore, be separated from the rest of the award.

(a) 3 B. & Ad. 295.

(c) 9 Dowl. 1044, 1047.

(b) 8 Taunt. 697.

ERLE, J.—I am of opinion that this rule must be discharged. By this award the umpire finds that there is a sum of money due from Goddard to Mansfield, which he directs to be paid by Goddard on a certain day; and, as respects this part of the award, no dispute arises. He then goes on to order that Goddard shall be solely liable for the payment of certain bills and accounts, for which Mansfield was primarily liable, but which were for materials supplied in the course of building the ship, of which Goddard was one of the joint owners. The affidavits in answer to the rule shew, that when the parties were before the umpire, Goddard produced a memorandum of these bills, and offered to discharge them on his being allowed credit for their amount; that that amount was accordingly deducted from the gross sum owing by him, and that the award was given for the balance only. Now, after having himself requested the umpire to make this deduction, and to give an award for the balance only, I think he clearly cannot come and object to the authority of the umpire, and allege that this was not a matter in difference.

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With regard to the direction that he should take upon himself the liability in respect of these accounts, and execute a bond of indemnity to Mansfield, I am inclined to think, on the authorities, that this was no excess of power on the part of the umpire: that where there is authority to order payment at a future time, an arbitrator may award a bond of indemnity; and that for this position, *Cooke v. Whorwood* (a) is a sufficient authority. The arbitrator there had awarded, that the plaintiff should pay the defendant several sums of money at several times, and that the defendant should give a bond in the penalty of 1800*l.*, with a sufficient surety to pay it accordingly; and the Court in giving judgment, say, "true it is, that the award that the defendant shall find a surety is not good; but the award that the defendant himself shall be bound in a bond,

(a) 2 Wms. Saund. 337.

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is good enough." It has, however, been urged, that the terms of the reference in that case do not appear; but it is plain that there could have been no point raised, if the reference had contained any power to order a bond to be given. The case of *Brown v. Watson* (a), is also a direct authority in point, and that case is founded on *Phillips v. Knightly* (b). If the arbitrator had power to order that Goddard should be liable for these debts, as between him and Mansfield, it would seem to follow that he had power also to enforce that order by directing a bond of indemnity to be given, which is going no further than the award that he shall take upon himself the liability in respect of those debts.

I am, however, of opinion that, at any rate, this portion of the award is clearly separable from the rest, and then that the case would come within the principle, that where the good part of an award can be separated from the bad, the good stands, and the bad falls to the ground.

The award of mutual releases, I think, was good as to all claims and demands submitted to arbitration, and void as to any not existing at the time of, or submitted by, the reference; but there may be some doubt whether the arbitrator had power to order that the form should be settled by a third party. That part, however, is clearly separable from the former, and, indeed, the award of releases might well, if necessary, be altogether separated from the rest of the award, and leave a good award standing.

The rule to set aside the award must, therefore, be discharged.

Bovill. As part of the award is bad, the rule should be absolute as to that part.

ERLE, J.—No: the bad part of the award falls to the ground, as if it had not been contained in it.

Rule discharged.

(a) 6 Bing. N. C. 118.

(b) 2 Stra. 903.

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NOLLOTH v. CROOK.

January 25.

[*Bail Court. Coram Erle, J.*]

THIS was a rule calling upon the plaintiff to shew cause why he should not forthwith bring in the record, and carry in the roll in this cause, and why the defendant should not be at liberty to enter a suggestion thereon to deprive the plaintiff of costs under the County Courts' Act (9 & 10 Vict. c. 95.)

It appeared upon the affidavits upon which the rule was obtained, that the action was brought to recover the sum of 16*l.* 14*s.* 6*d.*, and that at the trial before the undersheriff of Norfolk, at the Shire Hall, in the Castle of Norwich, on the 28th of November, 1849, the plaintiff recovered a verdict for the sum of 11*l.* 17*s.* 8*d.*, and no more. The affidavits, which were made by the defendant and two other persons, stated where the residences of the plaintiff and the defendant were situate, and that they were within twenty miles of each other by the high road. They also negatived the exceptions in the 128th section of the County Courts' Act in the usual manner.

The affidavits in answer shewed that the deponents had measured the distance by the high road between the plaintiff's and the defendant's residences, and that it was upwards of twenty miles; one stating it to be twenty miles six furlongs, and one hundred and thirty yards or thereabouts, and others stating it to be twenty-one miles two chains.

Sir *J. Bayley* shewed cause. The present application is answered upon the merits, by the affidavits, which the plaintiff produces, and which state positively that the plaintiff's and defendant's residences are more than twenty miles asunder. A suggestion, therefore, ought not to be permitted.

Gray, in support of the rule, was stopped by the Court.

Where upon a motion to enter a suggestion to deprive a plaintiff of costs, under the County Courts' Act (9 & 10 Vict. c. 95), the fact relied upon by the defendant as bringing the case within the 129th section, is, that the plaintiff and the defendant reside within twenty miles of each other, which is contradicted by the affidavits on the part of the plaintiff; the Court will, nevertheless, permit the suggestion to be entered, as the plaintiff is not concluded by it, but may traverse and try the fact.

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ERLE, J.—I am of opinion that the rule must be absolute to enter a suggestion. The question of disputed fact is never decided by the Court on a motion of this kind. The plaintiff is not concluded by the present rule being granted, as he may, if he please, try the truth of the fact by a traverse of the suggestion. The case of *Butler v. Corney* (a) is in point.

Rule absolute (b).

(a) 6 D. & L. 45.

trial of the suggestion were to

(b) By consent, the costs of the

abide the event.

[The two following cases, relating to suggestions under the County Courts' Act, and decided in the same Court in the following Term, may be here conveniently inserted.]

[May 7.]

CATERER v. DEAN.

[Bail Court. Coram Coleridge, J.]

Where on a motion to enter a suggestion under the County Courts' Act, to deprive the plaintiff of costs, on the ground that the place where the contract was entered into, was within the jurisdiction of a County Court within which the defendant resided, the defendant alone swore to a conversation, in the course of which he alleged the contract to have been made, without shewing that any other person was present who could depose to the fact; and the plaintiff denied the contract having been then made, and alleged that it was entered into at a different time and place: the Court refused to permit a suggestion to be entered.

THIS was a rule calling upon the plaintiff to shew cause why he should not bring into Court the record in this cause, and carry in the roll; and why the defendant should not be at liberty to enter a suggestion thereon to deprive the plaintiff of his costs; the verdict found for the plaintiff being for a sum for the recovery of which a plaint might have been entered in a County Court pursuant to the 9 & 10 Vict. c. 95.

The affidavit of the defendant, in support of the rule, stated "that the action was brought to recover a sum of 3*l.* 17*s.* 6*d.*, for the board, lodging, and education of defendant's son, from Michaelmas to December, 1848.

That about a week before the deponent's son commenced his board, lodging, and education aforesaid, the plaintiff called upon the deponent at his then residence at Waltham, St. Lawrence, in the county of Berks, where this deponent then dwelt, and where and when the contract for the board, lodging, and education aforesaid was entered into between this deponent and the plaintiff; and that he continued to dwell there from the date of the said contract until and after the time this present action was brought." The affidavit went on to state, that the parties lived within twenty miles of each other, and that each of them, at the time of the commencement of this action, dwelt within the jurisdiction of the County Court of Berkshire, the dwelling of the plaintiff being in the Reading district of the said Court, and the dwelling of this deponent being in the Windsor district of the same Court.

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The affidavit in answer was made by the plaintiff, and stated as follows:—"That he, this deponent, first became acquainted with the defendant on a Sunday, in the month of September, in 1848, while visiting in the neighbourhood of the defendant's residence at Waltham, St. Lawrence, in Maidenhead, in the said county of Berks, and that on such occasion the defendant inquired of the deponent as to his, the deponent's, terms, for the board and education of a boy, aged about eleven years, as a weekly boarder; and that the deponent then stated what his terms were, and the defendant then said, that they appeared to be very fair. That he, the deponent, never had any other conversation with the defendant in connection with his, the deponent's, school, or his terms, until the defendant brought his son, George Buxton Dean, to his, the deponent's, school, at Reading aforesaid, about a fortnight after the Sunday above mentioned. That no contract whatever for the board, lodging, and education of the defendant's son was made between the deponent and the defendant, until the said boy was brought to the deponent's school at Reading aforesaid, and that he, the deponent, did not enter into any arrangement with the

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defendant on the said Sunday above mentioned, nor at any other time, until the said son of the defendant was so brought and left with him, the deponent, as aforesaid. That the place of the defendant's residence, 'Waltham, St. Lawrence,' although in the said county of Berks, and within ten miles distance from Reading, is in the district of, and subject to the jurisdiction of, the Berkshire County Court, at Windsor, in the said county of Berks, and that the place of the deponent's said residence at Reading aforesaid is in the district of, and subject to the jurisdiction of, the Berkshire County Court, at Reading aforesaid, and that each place is subject to a separate and distinct jurisdiction, as the deponent has been informed and believes. That no contract between him, the deponent, and the defendant, was ever at any time entered into for the said board, lodging, and education of the defendant's son, within the jurisdiction of the said Berkshire County Court, at Windsor, within which jurisdiction the defendant dwelt, and carried on his business at the time this action was brought; and that the cause for which this action was brought arose wholly and in every material point within the jurisdiction of the said Berkshire County Court, at Reading, within which jurisdiction, he, the deponent, then dwelt, and still dwells."

Unthank shewed cause. The ground for this suggestion is, that the contract, for the breach of which this action is brought, was made within a County Court district, within which the defendant dwelt. This ground is supported by the affidavit of the defendant only, and the affidavit of the plaintiff in answer distinctly contradicts the fact. It is submitted, that under these circumstances the rule must be discharged. The defendant ought to come here with evidence which might be adduced upon the trial of the suggestion, or at any rate should shew affirmatively that such evidence exists. The plaintiff ought not to be deprived of his costs, and put to incur the expenses of a trial upon the

suggestion, except upon the clearest and most distinct *primâ facie* case in favour of the defendant. In *Walker v. Furnell* (a), which was a motion to deprive the plaintiff of costs under the County Court Act, *Parke*, B., in giving judgment, says, "With regard to what has been said as to our decision not being final, because the plaintiff may traverse the suggestion, we ought to be careful how we put a party to the expense of a traverse, because there are no means by which he can, if successful, obtain his costs." In *Nolloth v. Crook* (b), it is true that upon contradictory affidavits this Court permitted the suggestion to be entered, saying, that "the question of disputed fact is never decided by the Court on a motion of this kind;" but there the question was as to the distance between the residence of the defendant and that of the plaintiff, and it could be measured. Besides, there were affidavits on both sides of other parties than the plaintiff and defendant, who might be called as witnesses upon the trial of the suggestion.

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Woolmer, in support of the rule. The defendant is entitled to enter a suggestion. [*Coleridge*, J.—Will you consent that the costs of this motion and of the trial of the suggestion shall abide the event?] The defendant, it is submitted, is entitled to have the present rule made absolute with costs. In *Hayter v. Fish* (c), *Coltman*, J., says "*Butler v. Corney* (d) establishes that it is only necessary for the defendant to make out a *primâ facie* case to entitle himself to enter a suggestion, and in this case we think that enough has been stated to justify the motion." [*Coleridge*, J.—Yes, but the marginal note there is, that "a defendant is entitled to enter a suggestion," &c., "upon making out a *primâ facie* case, which is *not denied* by the plaintiff." Here the *primâ facie* case is denied.]

(a) *Post*, p. 127.

(b) *Ante*, p. 37.

(c) 6 D. & L. 355, 6; S. C. 6 C. B. 568. Since overruled by

the Common Pleas in Easter Term, 1850. See *Kirby v. Hickson*, *post*.

(d) 6 D. & L. 45; S. C. 2 Exch. 474.

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COLERIDGE, J.—No case has been cited in which, where the defendant alone has alleged the place where the contract was made to be within the jurisdiction of the County Court, and the plaintiff has denied that allegation, this Court has granted permission to enter a suggestion; and if we were to adopt the general rule which obtains in ordinary applications to the Court, where affidavits are produced in opposition, contradicting those on which the rule to shew cause has been obtained, the rule would be dismissed. No case has been decided which shews that the general rule which the Court has laid down does not apply to a case like the present.

The question, therefore, is, whether the affidavit of the plaintiff sufficiently negatives the fact that the contract was made within the jurisdiction of the County Court within which the defendant resided. On the one side, the defendant swears that the contract was entered into within the Windsor district of the County Court of Berkshire; on the other, the plaintiff admits a conversation to have there taken place, but says that the contract was not made till afterwards, and out of the district. The defendant contents himself with swearing generally as to the legal result of the facts; the plaintiff, on the contrary, states the facts with particularity; and certainly, if we are to look at the probabilities of the case, the plaintiff's account seems the most natural. [His Lordship here commented on the facts of the case.]

I wish, however, to be distinctly understood as confining my decision to the facts of this particular case. This is not a case where the defendant brings forward a third party to swear to the place where the contract was made, or even shews that any one was present at the time when the contract, as he alleges, was made, whom he might call as a witness on the trial of the suggestion; but here the defendant merely asserts the fact which the plaintiff denies, and it does not appear that any further evidence could be adduced in support of the suggestion than what is here

stated. I therefore think, that no sufficient ground appears for granting this application, and that the present rule must be discharged.

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Rule discharged (a).

(a) See the next case.

MILLS v. BEST (a).

[May 8.]

[Bail Court. Coram Coleridge, J.]

THIS was a rule calling upon the plaintiff to shew cause why he should not bring into Court the record in this cause and carry in the roll, and why the defendant should not be at liberty to enter a suggestion thereon to deprive the plaintiff of costs under the County Courts' Act.

The affidavit in support of the rule was made by the defendant, and stated that on the trial of the action before the sheriff, which was in debt for money had and received, and on an account stated, the plaintiff "recovered a verdict for 10*l.*, and no more, upon an I. O. U. for that amount." It negatived the exceptions in the 128th section of the County Courts' Act, (9 & 10 Vict. c. 95), in the usual manner; and then stated, "that the plaintiff's cause of action wholly arose at Brixton aforesaid, in the county of Surrey aforesaid, and within the jurisdiction of the said Lambeth County Court of Surrey," (within which it was stated that the defendant dwelt and resided), "and not elsewhere."

On a motion to enter a suggestion to deprive the plaintiff of costs, under the County Courts' Act (9 & 10 Vict. c. 95, s. 129), the defendant's affidavit stated that the plaintiff recovered in an action of debt for money lent, and on an account stated, "a verdict for 10*l.*, and no more, on an I. O. U.," "and that the cause of action wholly arose" within the jurisdiction of the County Court within which the defendant dwelt.

The affidavits in answer were made by the plaintiff and

(a) Decided in Easter Term, 1850.

The affidavits in answer were made by the

plaintiff and his wife, and stated that the verdict was recovered "in respect of an item of 10*l.* for money lent," and they shewed that the sum of 10*l.* had been lent to the defendant out of the jurisdiction: *Held*, that the suggestion must be entered, as it was quite consistent with the plaintiff's affidavits that the I. O. U., which was a material part of the cause of action, and which for aught that appeared was the plaintiff's sole evidence, was given within the jurisdiction, although the money was lent out of it.

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his wife, and set out the plaintiff's particulars in the action, which contained two items of 12*l.* and 10*l.* for money lent, and 11*l.* 10*s.* claimed as a balance. It was then alleged, "that at the trial the plaintiff recovered a verdict for 10*l.* in respect of the item for money lent on the 19th of December, 1848." That on or about the said 19th of December, 1848, he received a letter from the said defendant in his handwriting, dated Mitre Court Buildings, Temple, requesting the loan of 10*l.*, and that the plaintiff on the same day gave the said sum of 10*l.* to his wife to take, and that she then took the same to the said defendant in Mitre Court Buildings, Temple, aforesaid, where he filled the situation of clerk to a Barrister. That Mitre Court Buildings aforesaid is within the city of London, and not within the jurisdiction of the Lambeth County Court for Surrey. That in or about the month of July in the year 1849, deponent called on the defendant at his employer's chambers in Mitre Court Buildings aforesaid, and requested payment of the said sum of 10*l.*, when the defendant excused himself from then paying, but promised to do so shortly. That about a month afterwards he again called on the defendant at the said chambers in Mitre Court Buildings aforesaid, and saw the defendant and asked for payment, when the defendant stated that he was sorry to be unable to pay just then, but that he would certainly do so in a short time.

Hayes shewed cause. This rule must be discharged. The defendant's affidavit is fully answered by those of the plaintiff and his wife, and the case comes within the principle of the decision in *Caterer v. Dean* (a), and no sufficient ground appears for entering a suggestion.

Lush in support of the rule. It cannot be denied that the decision in *Caterer v. Dean*, at first sight seems to

(a) *Ante*, p. 38.

throw some doubt upon the defendant's right, under the above circumstances, to have a suggestion entered; but, it is submitted, the rule there laid down does not apply to the present case. It has hitherto been supposed to be sufficient in motions to enter suggestions, that the party should make out a *prima facie* case to entitle him to the suggestion, and that then, however strongly his affidavits might be contradicted by the opposite party, he has a right to have the suggestion entered, and the fact tried by a jury. In *Watson v. Quilter* (a), the right to have the fact tried by a jury is fully recognised. In *Peterson v. Davis* (b), the Court doubted whether, even if the suggestion were entered in the form asked for, the plaintiff could, in point of law, be deprived of costs under the statute; but they nevertheless allowed the defendant to make the necessary entry on the record, so as to obtain a judgment upon demurrer, which, if necessary, might be reviewed by a Court of error. If, indeed, it were to appear upon the defendant's own shewing that he could produce no evidence at the trial of the suggestion, of the fact which he seeks to suggest, the Court, in its discretion, would not, perhaps, subject the plaintiff to the delay and expense of trying a suggestion where the fact confessedly could only be found in one way. The case of *Caterer v. Dean* (c), seems to have been decided on that principle. There a defendant, upon his own affidavit, simply shewed that the contract which was sued upon, was verbally entered into between him and the plaintiff within the jurisdiction of the County Court, without shewing that any one else was present; and the affidavit, which was contradicted by the plaintiff, was held insufficient, as not shewing that the fact existed in such a shape, that the defendant could give any evidence of it upon the trial of the suggestion. But it is not necessary further to consider this point, as here the defendant's affi-

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(a) 1 D. & L. 244; S. C. 11 M.
& W. 760.

(b) 6 D. & L. 79.
(c) *Ante*, p. 38.

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davit remains uncontradicted. He swears that the plaintiff recovered a verdict for 10*l*. “upon an I. O. U. for that amount,” “and that the cause of action wholly arose at Brixton aforesaid,” “within the jurisdiction of” the County Court. He would be entitled to the suggestion if the cause of action “in some material point” only, arose within the jurisdiction. The plaintiff, in answer, merely swears that in his particulars he claimed two items of 12*l*. and 10*l*., and 11*l*. 10*s*. as a balance; and that he recovered a verdict for 10*l*., “in respect of the item for money lent, on the 19th of December, 1848.” It is quite consistent with the latter statement, that the I. O. U. may have been given within the jurisdiction, and have been the only evidence offered in support of the count for money lent; and yet the money have been lent out of the jurisdiction. [*Nolloth v. Crook (a)*, was referred to in the course of the argument.]

COLERIDGE, J.—I think that the statement made by the defendant in his affidavit is not necessarily contradicted by the plaintiff’s affidavit, and that, therefore, the rule must be absolute for entering a suggestion. In deciding the present case upon this point, I am not at all desirous of avoiding a reconsideration of my decision in *Caterer v. Dean (b)*, if it should become necessary. Without, however, going into the question now, I may say, that the limitation suggested by Mr. *Lush* seems to me to be a very proper one.

Rule absolute.

(a) *Ante*, p. 37.

(b) *Ante*, p. 38.



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REGINA v. THE JUSTICES OF CAMBRIDGESHIRE.

January 26.

[Ex parte THE NEWMARKET RAILWAY COMPANY.]

[*Bail Court. Coram Erle, J.*]

A RULE had been obtained in Michaelmas Term last, calling upon the justices in and for the county of Cambridge, and upon the churchwardens and overseers of the poor of the parish of Dullingham, in the said county, to shew cause why the said justices should not enter continuances, and hear an appeal of the Newmarket Railway Company, against two several rates or assessments made for the relief of the poor of the said parish of Dullingham, on the 16th of July, 1849, and the 28th of August, 1849; or why a writ of mandamus should not issue commanding them to enter continuances, and hear the said appeal.

It appeared from the affidavits upon which the above rule was obtained, that by a rate or assessment for the relief of the poor of the parish of Dullingham, in the county of Cambridge, made on the 16th of July, 1849, the Newmarket Railway Company had been assessed in respect of their occupation of certain land, station, and offices, &c., in the parish, in a sum of 7*l.* 4*s.* 1½*d.*, being 6*d.* in the pound on a gross estimated rental of 288*l.* 5*s.*, the rateable value being put at the same sum; and by another rate made the 28th of August in the same year, in a sum of 9*l.* 12*s.* 2*d.*, being 8*d.* in the pound upon the like estimate. The company gave notice of their intention to appeal against the said rates, and that on the 5th of October due notice and

On appeal against a poor rate, the respondents objected, that in respect of one of the grounds of appeal, it was necessary, under the 41 Geo. 3, c. 23, s. 6, that notice of the appeal should have been given to the persons therein named. The appellants denied that the ground of appeal came within that section. The sessions, however, decided that a notice was necessary to be given under the statute. The appellants then offered to abandon that ground of appeal, and proceed with others in respect of which no notice at all was required.

The sessions refused to permit them to do so, and dismissed the appeal: *Held*, on motion for a mandamus, that the sessions had power to decide upon whether they would permit the appellants to abandon that particular ground of appeal, and proceed with the others; and that having done so, this Court would not interfere to review their decision.

Where the sessions have put a particular construction upon a ground of appeal, if it will bear that construction, this Court will not review their decision.

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grounds of appeal were served upon the churchwardens and overseers of the parish. The notice was in the usual form, and was addressed "To the Churchwardens and Overseers of the poor of the parish of Dullingham, in the county of Cambridge, and to each and every of you." The grounds of appeal were fifteen in number.

The tenth ground of appeal was because the appellants were rated upon the gross, instead of the net, rental of their premises, &c., contrary to the provisions of the statute.

The eleventh ground of appeal was as follows:—"That upon the face of the said rates and assessments, and each of them, it appears, and, the fact is, that the said Newmarket Railway Company are in and by the said rates and assessments, and each of them, rated," &c., "for and in respect of the said land," &c., "in a greater and higher proportion than divers other persons, namely," (here followed the names of five and twenty persons, two of whom were the churchwardens of Dullingham) "whose names are inserted in the said rates," &c., "and who are thereby rated," &c., "as the occupiers of tenements, hereditaments, and premises in your said parish of Dullingham; inasmuch as the said Newmarket Railway Company" "are, as appears upon the faces and face of the said rates," &c., "respectively, in and by the said rates," &c., "respectively rated," &c., "upon the gross estimated rental of the said land," &c., "in respect of which the said company was rated," &c.: "whereas the said persons above mentioned and referred to, or some of them, are in and by the said rates," &c., "and each of them, as also appears upon the faces and face of the said rates," &c., "respectively rated," &c., "upon amounts less than the gross estimated rentals of the tenements, hereditaments and premises, occupied by the said persons above mentioned, or some of them, and in respect of which they were rated," &c., "in and by the said rates respectively."

Amongst the other grounds of appeal there were some in respect of which no notice was required to be given, such as that the rates were bad upon the faces thereof; that they

were not published and allowed in due course of law, &c.; and, fifteenthly, that the company were "assessed at too large a sum, and in an unfair proportion, in comparison with the sum and proportion assessed on all the other inhabitants and occupiers whose names are mentioned in the said rates."

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The appeal came on to be heard at the October Quarter Sessions, 1849, for the county of Cambridge, when the appellants proved the service of the notice and grounds of appeal on the churchwardens and overseers, and were proceeding with the appeal when they were stopped by an objection on the part of the respondents, that they had not proved that the several persons whose names were mentioned in the eleventh ground of appeal, had been duly served with the notice and grounds of appeal. The appellants insisted on their right to be heard in support of that ground of appeal without proving any such notices; but submitted that even if they were not, they ought not to be prevented from going into the other grounds of appeal in which the names of third persons were not referred to; and they offered to abandon the eleventh, and call witnesses in support of the other grounds of appeal. This, however, the sessions refused to permit, and dismissed the appeal.

The affidavits in answer shewed that the sessions had dismissed the appeal on the ground of the insufficiency of the notice served, before the appellants offered to abandon the eleventh ground of appeal; and that the chairman, in answer to that application, said, "You cannot withdraw the eleventh ground of appeal after you find the decision of the Court against you."

The sessions, having dismissed the appeal, the present rule was afterwards obtained, against which

Watson and Worlledge now shewed cause. Two questions will be raised in the present case. First, whether it was necessary to serve the persons whose names were set out in the eleventh ground of appeal, with notice and grounds of

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appeal, pursuant to the statute 41 Geo. 3, c. 23, s. 6; and, secondly, whether, if it were, and the objection were taken at the trial before the quarter sessions, the appellants could, after a decision against them, abandon that ground of appeal and proceed upon others, with regard to which no notice was necessary to be given. And of these two questions, it is submitted, the former must be answered in the affirmative, and the latter in the negative. The terms of the eleventh ground of appeal rendered it necessary that notice of it should be given to the twenty-five persons therein named. The 17 Geo. 2, c. 38, s. 4, confers the right to appeal against any poor rate, upon reasonable notice, to be given to the churchwardens and overseers of the parish only. And section 6 provides, that the sessions shall amend the rate "in such manner only as shall be necessary for giving such relief, without altering such rates or assessments, with respect to other persons mentioned in the same." The 41 Geo. 3, c. 23, s. 4, enacts, that notices of appeal shall be in writing, and shall be given to any of the churchwardens or overseers of the parish, and shall state and specify the particular grounds of appeal; "and upon the hearing of any appeal from or against any such rate," &c., "the Court of general or quarter sessions to which such appeal shall be made, shall not examine or inquire into any other cause or ground of appeal than such as are or is stated and specified in the notice of appeal." Section 5 of the same statute enacts, "that with the consent of the overseers," "and with the consent of any other person interested therein," the Court may hear the appeal though no such notice have been given. Section 6 enacts, "that if any person," &c., "shall appeal against any rate," &c., "because any other person," &c., "is" "rated," &c., "in any such rate," &c., "at any greater or less sum or sums of money than the sum or sums at which he," &c., "ought to be rated," &c., "therein, or for any other cause that may require any alteration to be made in such rate," &c. "with respect to any other person," &c., "then and in every such

case the person," &c., "so appealing," "shall give such notice of appeal, in writing as hereinbefore mentioned, not only to the churchwardens," &c., "but also to the other person," &c., "so interested or concerned in the event of such appeal as aforesaid; and such other person," &c., "shall, if he," &c., "shall so desire, be heard upon the said appeal; and it shall be lawful for the Court of general or quarter sessions," &c., "on the hearing of such appeal, to order the name," &c., "of such other person," &c., "to be inserted in such rate or assessment, and him," &c., "to be therein rated and assessed at any sum or sums of money; or to order the name," &c., "to be struck out," &c., "or the sum or sums at which he," &c., "is" "rated or assessed therein, to be altered, in such manner as the said Court shall think right; and the proper officer of the said Court shall forthwith add to or alter the rate or assessment accordingly." The eleventh ground of appeal is in effect, that the appellants are overrated in respect of certain parties named, and, therefore, the case comes under the section last referred to, and notice of appeal ought to have been given to those parties. The reason given why they are overrated, would not restrict the ground of appeal at the trial; and it is submitted, that under the terms of the 6th section of the 41 Geo. 3, c. 23, the sessions might have altered the sums in which the parties named were respectively rated. That this ground of appeal was not simply because the appellants were rated in respect of a gross rental, instead of on a net rental, as required by the statute, is clear from a separate ground of appeal being addressed specifically to that objection. The plain and simple reading of this ground of appeal is, that the appellants complain that they are overrated in respect of the parties named, since they are rated on their gross rental, whilst the parties named are rated respectively upon less than the gross rental of their property. The sessions are not bound, however, to read this ground of appeal with the strictness of a special plea. They have put a construction

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on it which it is capable of bearing, and this Court will not interfere to question the propriety of it; *Reg. v. Justices of Kesteven* (a). In *Rex v. Justices of Suffolk* (b), one ground of appeal was, that the appellant was rated, in respect of his lands, in a higher proportion than all the other inhabitants mentioned in the rate; and it was objected, that notice of the appeal ought to have been given to every person mentioned in the rate; but the Court held that that need not be done, and *Bayley, J.*, in giving judgment, says, "The statute 41 Geo. 3, c. 23, first gave to the justices the power of amending the rate appealed against, instead of altogether quashing it; but required the grounds of the appeal to be stated, and notice to be given to the parties affected by the appeal. So that where the ground is that A., B., or C., are underrated, it would be necessary to give notice to those individuals: but where the ground of complaint is, that the party appealing is overrated in respect to all the rest, then it would not be necessary, because the alteration sought is the diminution of his assessment only, and the rest of the rate remains entire." In *Rex v. Brooke* (c), it was held, that where the ground of appeal against a poor rate is the omission of some person who ought to be rated, the justices at sessions cannot hear the appeal, unless notice of it have been given to the party said to be improperly omitted. In *The Queen v. Justices of Cambridgeshire* (d), the appellants against a poor rate objected to the rating on twelve persons; notice of objection was proved to have been served only on eight out of the twelve, and the sessions dismissed the appeal, because the service of notice on all the twelve was not proved, although there were other grounds of appeal,

(a) 3 Q. B. 810; S. C. 1 D. & M. 113.

(b) 1 B. & A. 640.

(c) 9 B. & C. 915; S. C. 4 M. & R. 719.

(d) Q. B. May 9, 1843. *Byles, Serjt.*, and *Worlledge*, shewed

cause against the rule for a mandamus; and *F. Gunning* and *Birch* in support of the rule. Cited from 7 *Just. of the Peace*, 306, 7; and from the briefs and notes of counsel in the case, which were produced in Court.

with respect to which no notice was required to be given ; and this Court refused to grant a mandamus to the sessions to compel them to hear the appeal.

As to the second point, it is submitted that the appellants could not abandon the eleventh ground of appeal at their pleasure. Where a party appeals, on the ground that other persons named are underrated, the giving notice to those persons is a condition precedent to the appellants having a locus standi in Court ; and when it is shewn that no notice has been given, the appeal must be dismissed. At any rate, it is in the discretion of the sessions to refuse to allow a ground of appeal to be abandoned, and as the appellants chose to insist that a notice was not necessary, and took the judgment of the Court of quarter sessions upon the point, this Court will not interfere.

Hawkins and *R. M. Newton*, in support of the rule. The eleventh ground of appeal did not require any notice of it to be given to the parties therein named. The whole of that ground of appeal taken together, shews that the objection to the rate was not that other parties were improperly underrated, but that the appellants were overrated in being rated on a gross rental, while the persons named were rated in respect of a net rental. Such a ground of appeal did not require a notice to be given under the statute, as no objection was made to the rating of the parties named. The ground of appeal in *Rex v. Justices of Suffolk*, differs from the present one only in the circumstance that there the objection was that all the other inhabitants were properly rated, but that the appellant was not ; whilst here it is that some only of the inhabitants named are properly rated, whilst the appellant is not. In *Rex v. Brooke*, it does not appear whether there were any other grounds of appeal, but if there was only the one mentioned, that decision is quite consistent with the appellants' argument. The case of *Reg. v. Justices of Cambridgeshire*, is distinguishable. There the parties named in the ground of appeal were

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respondents in the appeal, and were, consequently, according to the general rule, entitled to notice of appeal.

But even if a notice were required in respect of the eleventh ground of appeal, it was competent to the appellants to abandon that ground and rely on the other objections, in respect of which no notice was required to be given (a); and it is the every day practice to do so. [They referred also to *Jacklin v. Fytche* (b), and *Breese v. Jerdein* (c).]

ERLE, J.—I am of opinion that this rule must be discharged. The case of *Reg. v. Justices of Kesteven* (d), establishes the doctrine, that where justices in sessions decide upon a point preliminary to the whole case, such as the construction to be put upon a notice of appeal, if the document be capable of the construction given to it by the Court below, this Court will not interfere. Here, the Court below have put a construction on the ground of appeal in question, namely, that it was in effect an appeal on the ground that the appellants were overrated, and that the other parties therein named were underrated; and inasmuch as there is a difference between saying that a party is overrated in respect of the rest of the inhabitants generally, and overrated in respect of certain persons named,—since in the one case it admits the rate to be generally correct, and impugns it only so far as the appellant's own assessment is concerned, whilst in the other it seems to me to allege an alternative proposition, either that the appellant is overrated, or that the parties named ought to be rated more highly, I think that this Court ought not to interfere to review the construction which the sessions have put upon it.

Taking it, then, as the case of an appeal in which a notice was by statute required to be given in order to

(a) See *Rex v. Justices of Westmoreland*, 10 B. & C. 226.

(b) 14 M. & W. 381.

(c) 4 Q. B. 585; S. C. 2 G.

& D. 720, n. (a).

(d) 3 Q. B. 810; S. C. 1 D. & M. 113.

enable the sessions to hear the appeal, and in which no notice was given, I think that the sessions exercised a wise discretion in treating the parties named in the ground of appeal as if they had been in fact made respondents to the appeal, and in refusing to hear the other grounds of appeal, because no notice had been given to them; and the case of *Reg. v. Justices of Cambridgeshire* is a direct authority that the sessions may dismiss an appeal on this ground. Whether or not the appellants offered to abandon this ground of appeal before the sessions had given their decision on the necessity of a notice being given, I think is immaterial, as I am of opinion that the sessions were not bound to accede to the application, but had power to reject the offer and dismiss the appeal; and having done so, that this Court will not interfere with the exercise of their discretion in the matter.

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Rule discharged.

Ex parte STEPHEN KELCEY, Lord of the Manor of East Leigh. *January 28.*

[In re the LYMINGE INCLOSURE AWARD.]

[*Bail Court. Coram Erle, J.*]

PRENTICE moved for a writ of certiorari under the 8 & 9 Vict. c. 118, s. 44, to remove the award of the assistant inclosure commissioner herein, determining the boundaries of the manors of East Leigh and Lyminge, in the county of Kent, into this Court.

The application was made on behalf of Mr. Stephen Kelcey, Lord of the Manor of East Leigh, upon affidavits, stating a service upon the inclosure commissioners of a notice by Mr. Kelcey of his dissatisfaction with the award, determining the boundaries of his said manor, and of the

A rule for a certiorari to bring up the award of an assistant inclosure commissioner, under the 8 & 9 Vict. c. 118, s. 44, is a rule absolute in the first instance.

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grounds of such dissatisfaction, and of his having an interest in the award, and of his intention to move for a writ of certiorari, and to proceed according to the act of Parliament; and also a service of a notice upon the commissioners reciting the former notice, and stating that at the expiration of eight days this Court would be moved for a writ of certiorari, and that he, Stephen Kelcey, was desirous of obtaining the said writ of certiorari, in order that the boundaries referred to in the said award and determination should be settled and ascertained by a jury. The affidavits stated the publication and service of the award, and set forth certain facts to shew that the assistant commissioner had come to a wrong decision.

Prentice. The party is entitled to a writ of certiorari, under the 8 & 9 Vict. c. 118, s. 44; and the only question is, whether it should be a rule absolute in the first instance, or a rule nisi only. It is submitted, that under the act of Parliament, upon these affidavits, the writ of certiorari must be issued, and that no cause can be shewn against such a rule. [*Erle, J.*—The usual practice, as I am informed, in cases under the Tithe Commutation Act, is to have the rule for a certiorari nisi only in the first instance.] By the 44th section of the present act, the motion is to be made “within six calendar months next after publication of the said boundaries,” “and after the expiration of the said term of six calendar months the determination of the commissioners or assistant commissioner shall not be removed or removable by certiorari, or any other writ or process whatsoever.” If a rule nisi only be granted, as it cannot be made absolute till next Term, more than six months will elapse in this case between the publication of the award and the writ issuing. This is probably the first application under the act, and the Court will, on seeing that the terms of the act have been complied with, and that no cause is likely to be shewn against the motion, grant the rule absolute in the first instance, and save the parties any further expense; as the writ is the mere formal proceeding, by which the Court

is enabled, on the award being brought before them, to direct a feigned issue to be tried to ascertain the rights of the parties.

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ERLE, J.—As soon as the party has brought himself within the terms of the 44th section, he is entitled to the writ. That section says, “that any person interested in the determination,” &c., and “dissatisfied with such determination,” “may,” on complying with certain requisites, “move the Court of Queen’s Bench to remove the said determination” “by certiorari into the said Court.” The affidavits in the present case shew that the requisitions of the statute have been complied with. The question is, whether it should be a rule nisi only, or a rule absolute, in the first instance; I do not very well see what cause could be shewn in a case like the present, and, therefore, I think it is the most convenient course to hold that the party is entitled to a rule absolute in the first instance.

Rule absolute.

HOARE, a Pauper, *v.* COUPLAND.

[In the Queen’s Bench.

January 14, 25.

Coram *Patteson, J., Coleridge, J., and Wightman, J. (a).*]

IN this case the plaintiff, who sued in formâ pauperis, had recovered a verdict for 50*l.* at the sittings after Trinity Term, 1849, before Lord Denman. She applied to the proper officer of the Court to sign judgment, but he had

A plaintiff who has obtained an order to sue in formâ pauperis, which order is still subsisting, is entitled to sign judgment upon a verdict in his favour,

(a) Lord Denman, C. J., was absent through illness.

without payment of any fee; although he has recovered a sum exceeding 5*l.*

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refused to permit her to do so, except upon payment of the usual fee of 8s.; on the ground that a pauper recovering a verdict for more than 5*l.* was bound, by the practice of the Court, to pay the usual fee upon signing judgment. Upon an affidavit of these facts, and that the order to sue in formâ pauperis was still in force, and that the plaintiff was not worth 8s.;

Carter now moved that the Master should be directed to sign the judgment gratis. The stat. 11 Hen. 7, c. 12, enacts, that the Judges of this Court “shall appoint attorney or attornies for the same poor person or persons, and all other officers requisite and necessary to be had for the speed of the said suits to be had and made, which shall do their duties without any reward for their counsels, help, and business in the same.” These words, it is submitted, include the officers of the Court. It is true that it is laid down in 2 *Chit. Archb. Pr.* 1122, 8th ed., that if the pauper “afterwards have judgment in the action for more than 5*l.*, the counsel, attorney, and officers are, it seems, entitled to their fees, at least to such fees as shall be allowed by the Master in taxing the costs;” and for this *James v. Harris* (a) is cited as an authority. That case, however, is no formal decision, but merely an expression of belief, upon the part of the learned Judge who tried the cause, that the practice was that the officers of the Court received their fees in such cases. In *Gougenheim v. Lane* (b), however, upon its being urged that where a plaintiff suing in formâ pauperis recovered a verdict for more than 5*l.*, the officers of the Court took their usual Court fees, *Parke*, B., observed, “It is difficult to see how the officers are entitled to their fees, even if 5*l.* are recovered.” In a subsequent case of *Pratt v. Delarue* (c), the same learned Judge observes: “It has certainly been a long established practice, that a pauper

(a) 7 C. & P. 257.

(b) 4 Dowl. 482, 5.

(c) 10 M. & W. 509, 513; S.C.
2 Dowl. 322, N. S.

shall pay no costs whatever; and the principle on which it rests was doubtless this, that it would be a great wrong to compel a person to pay costs who is totally destitute of money." The reason applies to the present case. The plaintiff, it is true, has obtained a verdict in his favour, but it still remains to be seen if he can realise the fruits of it. The attorney is not bound to pay this fee; for although, if he did pay it, he would be entitled to claim it from the defendant; and if he succeeded in obtaining the amount without having paid them, he would probably be liable to an attachment if he refused to do so; yet, as he may never succeed in obtaining any costs at all from the defendant, he is not bound to adventure the money.

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The judgment of the Court was afterwards delivered by PATTERSON, J.—The question in this case was, whether the Master was right in refusing to allow the plaintiff, who sued in formâ pauperis, to sign judgment on a verdict, which he had obtained for 50*l.*, until he had paid the usual fee. It was said to be the practice, that where a pauper plaintiff recovered a verdict for more than 5*l.*, he should pay the fee, and have it taxed as against the other party. Whether that be the right course or not, where the pauper plaintiff or his attorney chooses to pay the fee, we need not now stop to inquire. The question before us is, whether the pauper can be compelled to pay the fee before signing judgment, and we are of opinion he cannot. The Master will, therefore, permit the plaintiff to sign judgment without the payment of any fee.

Rule accordingly.



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January 28, 29. **Ex parte The CHURCHWARDENS and OVERSEERS of the Parish of BURWASH.**

[*Bail Court. Coram Erle, J.*]

A sum assessed by way of poor rate, is "a claim or demand" proveable under a commission of bankruptcy, under the 5 & 6 Vict. c. 122, and a certificate under that statute is therefore a bar to any subsequent proceedings under the stat. 43 Eliz. c. 2, to levy the amount by distress and sale of the bankrupt's goods.

A RULE had been obtained in Michaelmas Term last, calling upon R. Wetherell and G. C. Courthope, Esquires, two of her Majesty's justices of the peace in and for the county of Sussex, and on Francis Douglas Haviland, a ratepayer in the parish of Burwash, in the said county, to shew cause why the said two justices should not issue their warrant for the distress and sale of the goods and chattels of the said F. D. Haviland, in the said parish, for the recovery of the sum of 50*l.* 12*s.* 6*d.*, being the amount assessed upon him by a rate or assessment made on the 24th of November, 1848, for the relief of the poor of the said parish, under the 17 Geo. 2, c. 38; or why a writ of mandamus should not issue directed to the said two justices, commanding them to issue their warrant for the purpose aforesaid.

The following facts appeared upon the affidavits. On the 24th of November, 1848, a poor rate of 3*s.* in the pound had been made for the parish of Burwash, in the county of Sussex, of which F. D. Haviland was one of the ratepayers. The rate was allowed on the 25th, and published on the 26th. The sum in which Haviland was rated amounted to 50*l.* 12*s.* 6*d.* On the 23rd of December a fiat in bankruptcy was issued against Haviland, under which he obtained his certificate on the 9th of March, 1849. The churchwardens and overseers of the parish of Burwash never proved the rate of 50*l.* 12*s.* 6*d.* against his estate under the fiat; but on the 24th of August, 1849, they went before the two justices mentioned in the above rule, then sitting in petty sessions for the division within which the parish of Burwash is situate, for a summons calling on Haviland to shew cause why he should not pay

the rate, as well as a subsequent rate which had been made. Haviland attended before the justices, and alleged his certificate as a bar, whereupon the magistrates refused to grant a warrant (a).

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Hoggins shewed cause. The justices acted rightly in refusing to grant a distress warrant, the certificate of the bankrupt being a discharge as to the amount of the poor rate in question. The Bankrupt Act then in force (the 5 & 6 Vict. c. 122, s. 37), enacts, that the bankrupt having duly conformed, &c., to the laws in force touching bankrupts, "shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands made proveable under the fiat, in case he shall obtain a certificate of such conformity," &c. Here the bankrupt has obtained his certificate, and the amount of the poor rate, although not a debt, was "a claim and demand" "proveable under the fiat," from which his certificate released him. The case of *Harper v. Carr* (b), shews that the granting of warrants of distress for a poor's rate by magistrates, is a judicial and not a ministerial act; and they ought first to summon the party, and hear what he has to say in his defence. And the case of *Davis v. Shapley* (c), decides that under the former Bankrupt Act (6 Geo. 4, c. 16, s. 121), which enacts, that a bankrupt shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands thereby made proveable under the commission, in case he shall obtain his certificate, the goods, as well as the person of the bankrupt, are protected by the section.

Phinn in support of the rule. All that the parties seek

(a) Facts were also stated in the affidavits to shew that Haviland was not in continuous occupation of the premises during all the time for which the rates were

made; but nothing turned upon this.

(b) 7 T. R. 270.

(c) 1 B. & Ad. 54.

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by this rule is to have the legal right determined. It may be conceded that it formed a "claim and demand" proveable under the fiat; *Lloyd v. Heathcote* (a); and no doubt if it had been only recoverable by an execution in the nature of a fi. fa., the "claim" would be barred. But here the stat. 43 Eliz. c. 2, s. 4, confers an extraordinary remedy. It enacts, that "it shall be lawful," "by warrant from any two" "justices of the peace," "to levy as well the said sums of money and all arrearages, of every one that shall refuse to contribute according as they shall be assessed, by distress and sale of the offender's goods." In using the word "offender's goods," it seems to consider the party as quasi criminally responsible for the non payment of the rate. In *Palmer v. Sutcliffe* (b), it was held, that non payment of a lighting and paving rate under the provisions of a local act of Parliament, was an "offence" against the act, so as to come within the 7 Wm. 4, and 1 Vict. c. 78, s. 31, which enacts, that "all offences committed in any borough," &c. "against the provisions of any local act of Parliament, shall be cognizable by the justices of the borough," &c. It has been held that the right to distrain for rent is not barred by the certificate. [*Erle, J.*—There the right is exercised against the premises. There is a wide distinction between the cases.] [He referred also to *Reg. v. Bidwell* (c).

Cur. adv. vult.

On the following day.

ERLE, J.—I am of opinion that this rule must be discharged. The amount in question was, it seems to me, clearly a "claim or demand" proveable under the fiat, and therefore barred by the certificate.

Rule discharged.

(a) 2 B. & B. 388; S. C. 5
Moore, 129.

(b) 3 New Sess. Ca. 634.

(c) 1 Den. C. C. 222.

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January 30.

In re an Arbitration
Between GEORGE FIRTH
 and
 JOSEPH HOWLETT.

[*Bail Court. Coram Erle, J.*]

A RULE had been obtained in Michaelmas Term, 1849, calling upon George Firth to shew cause why the award or umpirage made herein between the parties should not be set aside, on the ground that the umpire, by whom the award was made, improperly and without authority, waiver, or consent of the said J. Howlett, made such award without examination of the witnesses who had been previously examined before the two arbitrators; on the occasion of whose difference such umpire was empowered by the submission to make an award.

It appeared upon the affidavits in support of the rule, that a deed of submission of all matters in dispute between the parties having been entered into, containing the usual powers to appoint an umpire, an umpire had been accordingly appointed. That the arbitrators not being able to agree, the matter was referred to the umpire. That the notes of the evidence given before the arbitrators were taken in writing, and signed by the arbitrators, and that such evidence was conflicting and contradictory. That at the meeting appointed by the umpire, Howlett attended, and required the umpire to hear the evidence and examine the witnesses; but that the umpire declined to do so, saying, that it was not necessary, as he had the notes of the evidence taken by the arbitrators before him. That he afterwards, and without examining the witnesses, proceeded to make the award in favour of Firth, which it was now sought to set aside.

Where upon a submission to arbitration, an agreement was entered into between the parties, that a clerk should be specially employed to take down in writing the evidence given before the arbitrators, and that the evidence so taken should, in the event of the arbitrators not agreeing, be sent under their seals to the umpire, who might thereupon in his discretion make his umpirage, without rehearing the evidence: and the umpire accordingly, at the hearing, refused to re-examine the witnesses, though requested to do so by one of the parties. Held no ground for setting aside the award.

It appeared upon the affidavits in answer, that previously

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to the arbitration being proceeded with, an express agreement was entered into between Howlett and the attorney of Firth, that a clerk should be specially employed for the purpose of taking down in writing the whole of the evidence given by both parties and their respective witnesses; and that the evidence so taken down and signed by the arbitrators should, in case the arbitrators did not agree, be sent under seal to the umpire appointed by the arbitrators, who was to make his award or umpirage from the same, to save further trouble, time, and expense; but that the umpire was to be at liberty, if he should think fit, to examine any evidence for and on behalf of the parties, touching the matters in difference between them.

Martin now shewed cause. There is a complete answer to this application upon the affidavits filed on behalf of Firth. They shew an agreement made between the parties before the reference was proceeded with, that a clerk should be specially employed to take down the notes of the evidence, and that in the case of a dispute arising, the umpire, to save expense and loss of time, should take these notes as admitted evidence between the parties, and not be bound to re-hear the witnesses himself. That agreement was acted on, the evidence was taken down, and it was too late for Howlett, when before the umpire, to seek to set it aside.

Atherton in support of the rule. It cannot be denied upon these affidavits, that such an agreement was entered into; but, it is submitted, it was competent to either party, when before the umpire, to withdraw his consent, and require the umpire to adopt the usual course, and hear the witnesses himself. It was a revocable agreement, which would have justified the umpire in making his award upon the notes of the evidence given before the arbitrators, if not objected to; but which could be of no effect if revoked at any time before the umpire had proceeded with the case.

ERLE, J.—I do not think I ought to set aside this award, for I do not see how, if I were to do so, I could place the parties in the position in which they would have been if the agreement had been not made. Extraordinary expenses have been incurred in the mode of taking the evidence, and the witnesses may possibly have been sent away. Besides, I am strongly inclined to think that a party would be bound by an agreement like the present.

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Rule discharged.

In re a Complaint or Suit in the County Court of
CARDIGANSHIRE

January 30, 31.

Between DAVID JONES
and
RICHARD JAMES.

[*Bail Court. Coram Erle, J.*]

THIS was a rule, obtained on the 23rd of January, calling upon the plaintiff to shew cause why a writ of prohibition should not issue, directed to the Judge of the County Court of Cardiganshire, to prohibit the said Judge, the high bailiff, and other officers of the said Court, from further proceeding in the above complaint between the parties.

It appeared upon the affidavits that in the month of October, 1847, the plaintiff had applied to the Judge of the County Court of Cardiganshire, under the 60th section of the County Courts' Act, 9 & 10 Vict. c. 95, for leave to

A summons, dated the 3rd of January, 1850, was served upon the defendant, requiring him to appear before the County Court on the 25th of January. The defendant resided out of the jurisdiction of the County Court; but an order of the

Judge of the County Court, dated the 30th of October, 1847, and made under the 60th section of the County Courts' Act, was also served upon him at the same time, granting leave for the summons to issue. It did not appear whether any complaint had been entered in the County Court previously to that order being made. On the 19th of January, 1850, the defendant gave notice to the clerk of the County Court of his intention to rely at the trial upon the Statute of Limitations: *Held*, on motion for a prohibition, that whether the order in 1847 was a valid order, justifying the issuing the summons in 1850 or not, the defendant by appearing and pleading to the process, which brought him into Court, had waived all objections to its validity.

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issue a summons against the defendant, who was then, and still was, living out of the jurisdiction of that Court; and an order to that effect was accordingly made, dated the 30th of October, 1847. That order, however, did not appear ever to have been acted upon until the present month of January, 1850, because the plaintiff, as he swore, was unable till then to discover the place of residence of the defendant. On the 3rd of January, a summons to appear on the 25th of the same month, was issued out of the County Court of Cardiganshire, and served, together with the order, upon the defendant. The defendant, on the 19th of the same month, gave notice in writing to the clerk of the County Court, in pursuance of the 76th section of the act, and sect. 19 of the rules framed by the Judges under the act, of his intention to rely on the defence of the Statute of Limitations, as an answer to the plaintiff's demand, which was communicated by the clerk to the plaintiff. It did not appear whether any plaint had issued previously to the order of the 30th of October, 1847. No trial took place on the 25th, the hearing being adjourned.

Sir *J. Bayley* shewed cause. There is no time limited within which a summons may issue, after leave obtained of the Judge of the County Court, under the 60th section. There is, therefore, no want of jurisdiction in the County Court in issuing the present summons. But, at any rate, the defendant cannot come here for a prohibition, after having pleaded to the summons, by delivering a notice in writing, under the 76th section of the County Courts' Act, and the 19th rule, framed by the Judges under the act, of his intention to avail himself of the Statute of Limitations. That is a submission to the jurisdiction of the Court, which prevents him from afterwards disputing it.

M. Lloyd, in support of the rule. Where the inferior Court has no jurisdiction, a writ of prohibition has been

granted, even after execution; and no assent can cure the want of jurisdiction; *In re a plaint between Jones and Owen* (a). The question is, whether, when the leave of the Court has been obtained under the 60th section, the summons may be issued at any lapse of time afterwards; and it is submitted, that it cannot be so issued. When jurisdiction is claimed by the County Court, on the ground that the defendant resides within the district, the general rule is, that the defendant must reside there at the time of the issuing of the summons; but by the 60th section, it may issue "by leave of the Court for the district in which the defendant" "shall have dwelt or carried on his business, at some time within six calendar months next before the time of the action brought, or in which the cause of action arose." The Legislature, in requiring that in such a case the summons must be issued "by leave of the Court," must have intended that the Court should exercise a discretion at the time the summons is issued. That discretion is rendered nugatory, if the plaintiff may obtain an order, and not act upon it till years afterwards. According to Reg. 4 of the rules laid down by the Judges under the act, "the summons to appear to a plaint" "shall be dated as of the day on which the plaint was entered." The plaint in this case must be taken to have been entered when the order was applied for, and, therefore, the summons, if intended to be issued under that order, does not comply with the 4th rule. By the 78th section, under which the rules of practice in the County Court are framed, it is enacted, that "in any case not expressly provided for herein, or by the said rules, the general principles of practice in the superior Courts of common law may be adopted and applied, at the discretion of the Judges, to actions and proceedings in their several Courts." In 2 *Chit. Archb.*, 1439, 8th ed., it is said, "if an order be made, it must be drawn up and served within a reasonable time, or the opposite party may treat it as

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(a) 5 D. & L. 669.

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abandoned." [Erle, J.—There is no analogy between the cases.] A writ of summons in the superior Court must be served within four months from the date thereof. [Erle, J.—That is by statute.] Another objection is, that it does not appear that any plaint was entered before the order for issuing the summons was obtained; and if so, the order, it is submitted, was made without jurisdiction. [Erle, J.—If it be necessary, in order to give the Judge jurisdiction to make an order under the 60th section, that a plaint should have been previously entered, ought I not to assume, as the defendant could have shewn the contrary, and has not done so, that a plaint was so entered?] The summons appears not to have been issued till the beginning of January, 1850, and the plaint must be taken to have been entered at the same time.

Cur. adv. vult.

ERLE, J.—I am of opinion that this rule must be discharged. This is a case in which the County Court Judge had jurisdiction, if there were authority to issue a summons. It is left, however, somewhat in doubt whether the order of the 30th of October, 1847, is a valid subsisting order. The summons issued in January, 1850, whilst the leave of the Judge was obtained as far back as October, 1847.

Whether the entry of a plaint is a condition precedent to the Judge having authority to allow a summons to issue under the 60th section, or whether or not a summons may issue at any lapse of time after an order for leave to issue it has been obtained, it is not necessary for me to decide; because I think it is clear that the Judge had jurisdiction as soon as the defendant appeared and pleaded to the action, without taking any objection to the process which brought him into Court. There was, for aught that is stated to the contrary, what may have been a valid order, and a valid summons. The defendant goes to the office of the clerk of the County Court, and does what is equivalent to appearing and pleading, he gives a notice in writing

that he will rely at the trial of the cause upon the Statute of Limitations as a defence to the action. If the process then is to be considered as of doubtful validity, I am of opinion that the defendant, by coming in and pleading, made it, as far as he is concerned, a valid suit in the County Court, and took away from himself the power of afterwards examining into any question of irregularity in the process. There is no ground, therefore, for a prohibition, and this rule must, consequently, be discharged.

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Rule discharged.

ROBIESON, Administratrix, &c. v. REES.

January 31.

[*Bail Court. Coram Erle, J.*]

THIS was a rule, calling upon the plaintiff to shew cause why she should not bring in the roll ; and why the defendant should not be at liberty to enter thereon a suggestion to deprive the plaintiff of costs, under the County Courts Act (9 & 10 Vict. c. 95).

It appeared upon the affidavits, that the action was brought by the plaintiff as administratrix of one George Robieson, to recover a sum of 5*l.* 5*s.*, for the use and occupation of certain premises, during the lifetime of the deceased. That the cause was tried before the undersheriff of Middlesex, on the 17th of January, 1850, and a verdict returned for the plaintiff for the above sum. That an entry of the name of the cause was made in the book in the Master's office, in which entries of judgments signed are made, but that no amount of costs was entered, nor had there been any taxation of costs.

On a motion to enter a suggestion to deprive the plaintiff of costs under the County Courts' Act (9 & 10 Vict. c. 95), where the action was brought by an administratrix for a debt due to the intestate, it is not necessary that the affidavit in support of the motion should negative that the intestate, as well as the administratrix, was an officer of the County Court.

Where the plaintiff has signed judgment in the book in the Master's office, but has not proceeded to complete it by taxing his costs, the defendant is not bound to move to set aside the judgment, before applying to the Court for leave to enter a suggestion to deprive the plaintiff of costs under the County Courts' Act.

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The affidavit in support of the rule negatived the exceptions in the 128th section, in the usual manner, and stated, "that neither the plaintiff nor the defendant, at the time of the commencement of the action, was an officer of the Westminster County Court;" but did not state that the intestate was not an officer of the County Court.

Skinner shewed cause. The affidavit of the defendant should have negatived that the intestate was an officer of the County Court. The same reason that would prevent an officer from suing in the County Court, must apply to his representative. [*Erle*, J.—All that the defendant need do, is to bring the plaintiff within the language of the act.] Another objection is, that as judgment has been signed, the defendant ought to have moved to set aside the judgment, before asking to be allowed to enter a suggestion; *Soames and Another v. Cooper* (a); *Smith v. Roberts* (b). In those cases, it is true, the costs had been taxed and execution issued, which is not the case here. *Walker v. De Richement* (c), shews that the two Terms, within which the plaintiff shall cause the defendant to be charged in execution "after final judgment," run from the time when the judgment is signed, although the costs are not taxed.

Hawkins, in support of the rule, was not called upon.

ERLE, J.—This rule must be made absolute. It seems to me that it was not necessary that, in this case, there should have been any preliminary motion to set aside the judgment; for here no complete judgment has been signed. The cases cited are distinguishable.

Rule absolute.

(a) 6 D. & L. 238; S. C. 3
Exch. 38.

(c) 2 D. & L. 507; S. C. 6 Q.
B. 544.

(b) 3 Exch. 39, n. (b).

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DOE dem. TODD and Another v. ROE.

January 21.

[In the Queen's Bench.

Coram Patteson, J., Coleridge, J., and Wightman, J.]

THIS was a rule, calling upon William Hopper, the tenant in possession, to shew cause why the plaintiff should not be at liberty to sign judgment against the casual ejector, unless the said William Hopper should appear and plead to issue within four days next after the end of the Term, notwithstanding the notice attached to the declaration directed to the said William Hopper to appear within the first four days of the Term.

Where the notice at the foot of the declaration in ejectment in a country cause, required the tenant to appear "within the first four days" of the Term, instead of within the Term generally; the Court discharged a rule nisi which had been obtained for judgment against the casual ejector; dubitante, Coleridge, J.

Woollett shewed cause. The notice is irregular, being to appear within the first four days of the Term, and the cause a country one (a). The case of *Doe d. Burton v. Roe* (b), is an express authority upon this point. There the Court refused to grant even a rule nisi for judgment against the casual ejector, where the notice at the foot of the declaration required the tenant to appear "on the first day" of the Term, instead of in the Term generally. And *Wilde*, C. J., says, "The rule of practice being well ascertained, we are not at liberty to consider, upon equitable grounds, how far it may with propriety be departed from." In *Lackland v. Badland* (c), the notice was to appear in eight days of St. Hilary, instead of Hilary Term generally; and the Court refused to allow the plaintiff to sign judgment against the casual ejector, saying, that the notice "might be considered as a nullity." In *Doe d. Forbes v. Roe* (d), a notice to appear "in due time" was held insuffi-

(a) Reg. Gen. Hil. Term, 4 Vict.
1 Q. B. 1; 4 P. & D. 522.
(b) 3 C. B. 607.

(c) 8 Moore, 79.
(d) 2 Dowl. 420.

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cient. The rule nisi in this case ought never to have been granted.

F. Robinson in support of the rule. In *Doe d. Burton v. Roe (a)*, the decision was put by Mr. Justice *Maule*, upon the ground that the tenant was misled by the notice; here he cannot have been misled, for he appears to the present rule. *Doe d. Forbes v. Roe (b)*, was decided on the ground that the tenant could not be supposed to know what the practice of the Court was. In *Doe v. Greaves (c)*, the notice was to appear in "Trinity Term next," instead of "Hilary Term next;" and the Court granted a rule for judgment. In *Doe d. Watts v. Roe (d)*, the notice was dated the 9th of May, 1836, and required an appearance in "next Easter Term," which would have been Easter Term, 1837, but notwithstanding the Court granted a rule nisi for judgment in Trinity Term, 1836. In *Doe d. Dimond v. Roe (e)*, the notice was to appear in "next Hilary," which was insensible; but as the word Term was clearly to be understood, the Court held the notice sufficient, and granted a rule for judgment. The general rule to be collected from the cases is, that if the tenant could not have been misled by the notice, this Court will allow the plaintiff to sign judgment.

PATTESON, J.—The case of *Doe d. Burton v. Roe* is quite in point. That case is even stronger than the present, for there the Court refused to grant a rule nisi; and there is no authority to shew, that where a rule nisi has been issued on an insufficient notice, the appearance of the party called on to shew cause has waived the defect in the service. In the case of *Doe d. Watts v. Roe*, it does not appear what became of the rule, and the other cases that have been cited are different from this. I am disposed to adhere to the decision in the Court of Common Pleas, and to treat this

(a) 3 C. B. 607.

(b) 2 Dowl. 420.

(c) 2 Chit. 172.

(d) 5 Dowl. 149.

(e) 8 Dowl. 71.

notice as bad. I do not mean to say that this Court will not modify its practice so as to do justice, but I see no reason for departing from the general rule, in the present instance.

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COLERIDGE, J.—I do not doubt that my learned Brothers have come to the sounder conclusion, but I cannot help thinking that abundant authority might be found for granting the present rule. I have always considered, that if it appeared that the defendant could not have been misled by the irregularity complained of, a rule to shew cause would be granted; and that if the defendant appeared to shew cause, and sought to do injustice by taking advantage of a mere blunder, this Court would make the rule absolute; and that this was the great difference between a statute and a rule of Court, that the latter might be modified, whilst the former could not, to prevent injustice. The stricter construction, however, may perhaps be the better course; but I think it will be difficult, after this decision, to grant indulgence in any case.

WIGHTMAN, J.—I think that the case of *Doe d. Burton v. Roe* ought to govern the present one; and that if we were to come to a different conclusion, we should set at naught the Reg. Gen. Hil. Term, 4 Vict.

Rule discharged.



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June 5, 6, 7,
1849.
February 26,
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In re JOHN HOVELL TRISTON, Gent, one, &c.

[*Bail Court. Coram Wightman, J.*]

The Court will not, in the exercise of its summary jurisdiction, prevent an attorney, who is the defendant in an action at the suit of his client, suing as administratrix, from pleading a plea not directly to the merits, such as the plea of the Statute of Limitations; even though the accrual of the statute may have been owing to his neglect in not advising the plaintiff to take out the letters of administration earlier.

Action by the administratrix of D. for money had

IN this case the facts and arguments will be found fully stated in the judgment of the Court.

In Trinity Term, 1849,

Sir *F. Thesiger* and *Hurlstone* shewed cause against the rule.

Watson and *Keane*, in support of the rule, referred to *Phillips v. Claggett (a)*, and *Rothschild v. Bookman (b)*.

Cur. adv. vult.

In the Vacation after the present Term, the following judgment was delivered by

WIGHTMAN, J.—This was a rule calling upon John Hovell Triston, an attorney of this Court, to shew cause why he should not pay to Joseph James Mason, and Ellen his wife, the sum of 1556*l.* 8*s.* 7*d.*, or such other sum, with

(a) 11 M. & W. 84; S. C. 2 Dowl. 1004, N. S.

(b) 2 Dow. & C. 188; S. C. 5 Bligh. N. S. 165.

and received by the defendant, who was an attorney, to the use of D. in his lifetime. Plea, the Statute of Limitations; replication, that D. was beyond the seas when the cause of action accrued, and did not return to England before his death, and that until the grant of administration, there was no one to sue, and that the action was brought within three days after administration granted. Rejoinder, that before and at the time of the death of D., the plaintiff Ellen was his wife, and might, within a reasonable time after his death, have obtained administration of his effects; but that she suffered more than seven years to elapse after the death of D. before she took out letters of administration: *Held*, on motion to refer it to one of the Masters to say what should be done in the action, that if there were circumstances which at law prevented the defendant, being an attorney, from setting up the defence of the Statute of Limitations, in an action on a money demand at the suit of his client, the proper way for the plaintiff to avail herself of them was by a surrejoinder, and not by calling on the Court, on affidavit, to interpose its summary jurisdiction, and prevent the defendant from pleading the plea of the Statute of Limitations.

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interest, as the Master might find to be due from Triston to them; and why it should not be referred to one of the Masters to say what should be done in an action in which the said Joseph James Mason, and Ellen his wife, were plaintiffs, and the said Triston and one Sebastian Crespel Hardey, were defendants.

It appeared that Mason and his wife, as administratrix of John Douglas, deceased, commenced an action in the year 1848, in the Exchequer, against Triston and Hardey, in assumpsit for money had and received by the defendants for the use of Douglas in his lifetime, and also for money had and received by the defendants for the use of the plaintiff Ellen, as administratrix after the death of Douglas, and before her marriage.

The defendant Hardey pleaded non assumpsit, and the defendant Triston pleaded, among other pleas, that the plaintiff Ellen was not administratrix of Douglas; and except as to 650*l.* parcel, &c., the Statute of Limitations.

The plaintiffs replied as to so much of the plea of the Statute of Limitations as applied to the causes of action in the lifetime of Douglas, that he was abroad when those causes of action accrued, and did not return to England before his death, and that until the grant of administration to the plaintiff Ellen, there was nobody to sue, and that the action was brought three days after administration granted; and to the residue of the plea, the plaintiffs replied, that the causes of action did accrue within six years.

To this replication the defendant Triston rejoined as to that part which applied to the causes of action in the lifetime of Douglas, that before and at the time of his death, the plaintiff Ellen was his wife; and might, within a reasonable time after his death, have obtained administration of his effects, but that she suffered more than seven years to elapse after the death of Douglas before she took out administration.

No further proceedings were taken in the action after

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this rejoinder, the fact being that Douglas died in August, 1838, and the letters of administration were not granted till January, 1846.

The present rule was then obtained, for the purpose of preventing the defendant Triston from availing himself of the plea of the Statute of Limitations, to so much of the demand as accrued in the lifetime of Douglas.

The two defendants had been in partnership as attorneys and solicitors, but had dissolved their partnership before the action; and one of them, the defendant Hardey, was the brother of the plaintiff Ellen.

It was alleged on the part of the plaintiffs, that the defendants were the attorneys and solicitors of Douglas and of the plaintiff Ellen, and also agents for them for the receipt and management of all money remitted by them to England from abroad; and assuming that to be the case, it was contended for them that the defendant Triston could not be admitted to plead the Statute of Limitations, or to rejoin as he had done.

It was said in support of the rule, that an attorney who is defendant in an action at the suit of his clients, is not to be allowed to plead every legal defence that he may have; and that the Court, in the exercise of its summary jurisdiction, will interfere to prevent his pleading any plea not directly to the merits, such as the plea of the Statute of Limitations in the present case; and that, at all events, Triston could not take advantage of the lapse of time before the letters of administration were taken out; as he ought, as attorney for the plaintiff Ellen, to have advised her to have taken out the letters earlier; and that it was, at least, neglect of duty in him not to have done so.

I can find no authority, however, for this position, nor was any cited; on the contrary, I find many instances in which attorneys have pleaded the Statute of Limitations and other matters of legal defence to actions brought against them by their clients, not only in tort, but in assumpsit, for breaches of duty and of contract, without

objection on account of their character of attorneys, and without application to the Court to restrain them; *Howell v. Young* (a); *Brown v. Howard* (b); *Short v. M^cCarthy* (c); *Whitehead v. Howard* (d), and many others.

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If there are circumstances which at law prevent an attorney setting up the defence of the Statute of Limitations to a money demand upon him by his client, the plaintiffs may avail themselves of them by a surrejoinder, but I do not think that I have any authority, in such an action as the present, to prevent the defendant from availing himself of any legal defence that he may have.

Being of this opinion, I cannot make this rule absolute, as the object of it is to take from the defendant the defence which he has made to part of the cause of action; and I therefore forbear to express any opinion upon the matter detailed in the affidavits which have been filed, further than this, that from the relative position of the parties, the defendant Hardey being the brother of the plaintiff Ellen, and this application not having been made until after his death, it might be very doubtful whether the application ought to be granted, independently of the fact of the parties having selected their own remedy by action. But without entering upon this question, it seems to me that the present application cannot be supported, and the rule, therefore, will be discharged, and being moved with costs, must be discharged with costs.

Rule discharged.

(a) 5 B. & C. 259.

(b) 2 B. & B. 73.

(c) 3 B. & A. 626.

(d) 2 B. & B. 372.



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January 22, 23.
February 26.

REGINA v. JUSTICES of HUNTINGDONSHIRE.

[*Bail Court. Coram Wightman, J.*]

A party summoned under the 7 & 8 Vict. c. 101, may give notice of appeal, under sect. 4, within twenty-four hours after the order is verbally pronounced by the justices, although it is not formally drawn up and signed by them till afterwards.

A verbal notice of appeal, under that section, given to the mother by the attorney of the father, in his presence and hearing, and at his request, is sufficient.

A RULE had been obtained in Michaelmas Term last, calling upon the justices of Huntingdonshire to shew cause why a mandamus should not issue directed to them, commanding them to enter continuances and hear an appeal of Thomas Aldridge, against an adjudication and order of the Rev. W. Palmer, clerk, and Richard Anthony Reynolds, Esq., two of the said justices, bearing date the 17th of May, 1849, whereby the said Thomas Aldridge was adjudged to be the father of a bastard child, whereof Jane Townsend had been there lately delivered, and ordered to pay to the said Jane Townsend, or such other person as in the said order mentioned, certain sums of money in the said order specified.

It appeared from the affidavit in support of the rule, made by the clerk of the attorney of Thomas Aldridge, the putative father, that Aldridge having been summoned before two justices to answer the complaint of one Jane Townsend, the mother of a bastard child, of which he was alleged to be the father, attended with the clerk of his attorney on the day appointed, the 17th of May, 1849, when the case was gone into, and evidence heard on both sides. That at the conclusion of the hearing, the justices required the room to be cleared, which was done accordingly; and the parties having been, after the lapse of a few minutes, again admitted, one of the justices stated that "they were of opinion that the complaint was substantiated; and that they adjudged the said T. Aldridge to be the putative father of the said bastard child of which the said Jane Townsend had been delivered; and that their order was, that the said T. Aldridge should pay the said J. Townsend the sum of 2s. per week for the said bastard child, and 10s. for the

midwife, and also the costs of the application, which costs Mr. Octavius Robert Wilkins, the clerk to the said justices, then and there, and in their presence, and in the presence of the said Jane Townsend, Thomas Aldridge, and your deponent, stated to amount to the sum of 1*l*. 7*s*. 3*d*.” The affidavit went on to state, “that after the said judgment of the said justices so delivered as aforesaid, the said Thomas Aldridge, in the presence and hearing of the said Jane Townsend, the said justices, and this deponent, said, ‘I shall appeal;’ and then and there instructed this deponent to give notice of appeal on his behalf; whereupon this deponent, in pursuance of such instructions, and for and on behalf of the said Thomas Aldridge, then and there addressed the said Jane Townsend, in the presence and hearing of the said justices, and the said Thomas Aldridge, in the words, or to the effect following, that is to say: ‘Jane Townsend, I, on behalf of Thomas Aldridge, give you notice that he will appeal against the said order now made by the magistrates now present, against him at the next general quarter sessions of the peace to be held at Huntingdon.’” The affidavit further stated, that deponent then and there applied to the clerk of the justices for the order, who told the deponent he could not let him have it then as he had not drawn it up, but that he would send it by that evening’s post. That, thereupon, the parties left the room. An order and duplicate were sent and were received on the 19th of May, by the putative father’s attorney. The order was in the usual form, and purported to be dated on the same day that the case was heard. On the 21st of May, Aldridge, and a person of the name of Peters, entered into the usual recognizances before a justice of the county, to try the appeal, and on the same day notice of the recognizances being entered into was given to the justices making the order, and to the mother. On the appeal coming on to be heard at the summer quarter sessions for the county of Hunts, the appellant was put upon proof of his notice of appeal to the mother. The clerk of the

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justices in petty sessions was called, who stated that the order was not drawn out or reduced into writing at the time the notice of appeal was so given. It was then objected by the respondent's counsel that the notice of appeal was inoperative and insufficient; first, because it was given in the manner described; and also, because the order appealed against had not been made when the notice was given. The sessions held the latter objection to be fatal, and refused to hear the appeal; whereupon the present rule was obtained, against which

Worlledge now shewed cause. Two questions will arise for decision in the present case. First, whether where the justices in petty sessions make an order of affiliation and maintenance on the putative father of a bastard child, the twenty-four hours, within which the notice of appeal is to be given by him to the mother of the child, under the 7 & 8 Vict. c. 101, s. 4, run from the moment when the justices pronounce their decision, or only from the time when the order is actually drawn up and signed by the justices. And, secondly, whether the notice must be given by the putative father himself, or is sufficient if given by a party in his presence, and acting on his behalf.

As to the first question, it is submitted, that the latter alternative is the correct construction to be placed upon the words of the statute. The 7 & 8 Vict. c. 101, s. 3, enables the justices to do two acts, to "adjudge" the man to be the putative father of the bastard child; and, if they see fit, "to make an order" on him for the payment of the maintenance and expenses. Section 4 requires the notice of appeal to be given *after* both acts are done; it enacts, that "if within twenty-four hours after the adjudication and making of any order on the putative father as aforesaid such putative father give notice of appeal to the mother of the bastard child, and also within seven days give sufficient security, by recognizance," &c., "it shall be lawful" for him "to appeal" to the next general quarter sessions, &c. "The making of

any order," it is submitted, must be taken to mean the drawing up and signing of the order by the justices, and until this is done, the order is not in point of fact made. By a subsequent statute, the 8 & 9 Vict. c. 10, certain forms are given in a schedule; and in the form, No. 8, which is the one applicable to the present case, the language used clearly shews, that the "making of the order," refers to the order in writing signed by the justices. It says, "We" "do hereby adjudge," &c., and "we do now hereby order," &c. The case of *Rex v. Justices of Cheshire* (a), shews that an order is not an order until the justices have signed it. In *Wilkins v. Hemsworth* (b) it was held, that the justices in petty sessions, having signed an order in bastardy, were not functi officio, but might, at the same sitting and after they had pronounced their judgment, or drawn up an informal order, vary their judgment, or sign a formal order. It is, therefore, the formal order that binds. The case of *Reg. v. The Justices of Flintshire* (c), is an express authority to shew that "the making of the order," in the 4th section, is the signing the order by the justices. There, on an appeal coming on to be heard, it appeared that the order, a copy of which was served on the putative father, was dated on the 24th of June, and that the service on the putative father was on the 27th of June, who, within twenty-four hours afterwards, gave notice of appeal. It was objected that this notice was too late; whereupon the appellants offered to prove that the order was not drawn up or signed till the 27th of June, and that the notice was consequently in time. And it was held, that the sessions acted wrongly in refusing to receive this evidence, and this Court granted a mandamus to compel them to do so. Mr. Justice *Williams*, in delivering judgment, says, "The statute requires that the notice should be given within a certain time after 'the making' of the order.

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(a) 5 B. & Ad. 439; S. C. 2 N. & P. 55.
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(c) 3 D. & L. 537, 541.

(b) 7 A. & E. 807; S. C. 3 N.

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I think the word ‘making’ of the order must be understood in its usual sense, and must mean an order properly made under the hands and seals of the justices.” The case of *Reg. v. The Justices of Derbyshire (a)* will, no doubt, be relied on in support of the rule. That case, however, only decides that the time for appealing runs from the time of making the order, and not from the time of serving it; and the words of the statute there under consideration were, that notice of appeal should be given “within six days after such order” “shall be made *or* given.” It may be said, that the putative father may not know when the order is, in point of fact, drawn up and signed; that it may not be drawn up and signed for several days, and that it would be impossible for him to ascertain the exact time within which he would be bound to give his notice if this construction were to prevail; but the answer is, that it is the duty of the clerk of the justices to draw up the order as soon as it is made, and the duty of the justices to sign it, when so drawn up; and this Court will not presume that either the clerk or the justices will neglect to perform their duty in this respect. A form being given in the schedule, the 8 & 9 Vict. c. 10, no difficulty can arise in at once drawing up and signing the order. The case of *The Queen v. Shipperbottom (b)*, shews that the forms given in that schedule are to be looked at in construing the statute.

With regard to the second question, it is submitted that the putative father must himself give the notice of appeal to the mother, and that it is not sufficient that the notice should be given by another person on his behalf. The words of the 7 & 8 Vict. c. 101, s. 4, are, that “if within twenty-four hours,” &c., “such putative father give notice of appeal,” &c., and “give sufficient security by recognizance,” &c., it shall be lawful for him to appeal against the order, &c. There are, therefore, two conditions precedent to the right of appeal, the latter of which must, without doubt, be

(a) 7 Q. B. 193.

(b) 10 Q. B. 514.

executed by the father in person, as it is submitted the former must also be. [*Wightman*, J.—Here the father says to her, “I shall appeal;” and desires the attorney’s clerk, who is there acting for him professionally, to give her notice to that effect, which the clerk accordingly then does in his presence. I have no doubt that that is a sufficient notice. Suppose that the man were unable, by reason of some infirmity or ailment, to give the notice himself, and some one acting for him, in his presence, and by his desire, gives the woman notice, that surely would amount to the same thing as if he gave the notice himself.] It must be admitted, that it has been decided that the notice need not be in writing. [*Wightman*, J.—I have no doubt that the notice was properly given.]

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Watson and *Burcham*, in support of the rule (a), were desired by the Court to confine their argument to the first point. The “adjudication and making of the order” mentioned in the 4th section of the 7 & 8 Vict. c. 101, refer to the actual decision pronounced by the justices in open Court, in the presence of the parties, after hearing the case, and not to the drawing up and signing the formal order. The notice of appeal, therefore, was good, although given before the order was drawn up and signed. The acts in question do not require that the adjudication and order should be in writing; and the case, therefore, differs from those in which an order of removal has been held to date from the time of signing by the justices, as there the statute expressly requires that it should be in writing and signed by the justices. And there is a reason why that distinction should exist, as in the latter case the order is made *ex parte*, and the written document is the first notice which the opposite party has of the proceedings. Here, the statutes contemplate that the putative father shall be present at the adjudication, or, at any rate, that he should have had a full

(a) On the following day.

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notice of it, by being previously summoned to appear. The adjudication and order are binding on the putative father, before they are reduced into writing and signed by the justices; and, therefore, there being a grievance, there is a right to appeal. [*Wightman, J.*—If there is merely a verbal adjudication and order, against which you contend there is a right to appeal, and nothing is reduced into writing, how is the party to proceed with his appeal?] It is the duty of the petty sessions to return the order in a formal shape in writing to the quarter sessions, before the time when the appeal is required to be lodged. In point of fact, the order ought to be at once drawn up and signed by the justices; but any delay or neglect on the part of their clerk in drawing up the order, or on their own part in signing it, cannot affect the parties' right to appeal. The form of order given in the schedule, No. 8, to the 8 & 9 Vict. c. 10, shews that the Legislature treats the making of the formal order as a contemporaneous act with the pronouncing the verbal order. The formal order speaks from the time of the hearing: "And whereas the said" (the putative father) "now appearing," "and the said" (the mother) "having now applied;" "and it being now proved to us," "we do now hereby order," &c. And if it is drawn up and signed afterwards, it must relate back to the hearing. If no formal order were drawn up at the time, and the father were to refuse or neglect to pay the money, the month, after the lapse of which a justice may issue a warrant against the father by the 7 & 8 Vict. c. 101, s. 3, would run, it is apprehended from the date of the hearing. So the weekly payments would date from the time when the verbal order was pronounced. A contrary construction of the act would render the power of appeal almost inoperative. For how can the father tell at what precise time the order may be drawn up and signed by the justices: and if he could, he may be enabled then to give the woman the notice of appeal, who may purposely keep out of the way to avoid service. The Legislature is restricting the time to twenty-four

hours, no doubt meant that it should be given at the time the parties were all before the justices. In the case of *Reg. v. Justices of Derbyshire* (a), this Court held that where, by a statute notice in writing of the grounds of appeal was to be given "within six days after such order, judgment, or determination shall be so made or given as aforesaid," the notice must be given within six days from the day when the order was agreed upon, and not from the day on which it was served. The case of *Reg. v. Justices of Flintshire* (b), which has been relied on by the other side, may be distinguished. There the appellant offered to shew, at the quarter sessions, that the order, though bearing date one day, was, in fact, made on a subsequent day, and, therefore, that his notice was in time; and the sessions refused to hear that evidence, which they were clearly not justified in doing. [*Wightman*, J.—The judgment, however, of my Brother *Williams*, goes to the very point in this case, that the "making the order" means the signing it by the justices.] The decision may be supported on the ground suggested. [The Malicious Trespass Act, 7 & 8 Geo. 4, c. 30, and notices under it were referred to, as was also *Reg. v. Justices of Lancashire* (c).]

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WIGHTMAN, J.—I shall take time to consider the case, in consequence of the decision of my Brother *Williams* in *Reg. v. Justices of Flintshire*, which has been referred to.

Cur. adv. vult.

WIGHTMAN, J.—The question in this case was, whether the notice of appeal could be supported.

The proceedings were under the 7 & 8 Vict. c. 101, ss. 2, 3, and 4, and it appeared that the justices, after hearing Thomas Aldridge, the putative father, and the mother and their witnesses, at a petty sessions held on the 17th of May, 1849, after consideration of the matter, informed the

(a) 7 Q. B. 193.

(c) 8 B. & C. 593.

(b) 3 D. & L. 537.

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said Thomas Aldridge, in the presence of the mother, "that in their opinion the complaint of the mother was substantiated, and that they *adjudged* him to be the putative father of the child, and that *their order was*, that he should pay to the mother 2s. a week, and 10s. for the midwife, and also the costs of the application," which costs the clerk to the justices then stated to be 1l. 7s. 3d.; whereupon the putative father, in the magistrates' presence, immediately gave verbal notice of appeal to the mother, and applied to the magistrates' clerk for the written order; but the clerk said he could not have it then, as he had not drawn it up, but he would send it by the post; and on the 19th of May the order was received by the post, and one in form and substance the same as the adjudication and order verbally made by the justices on the 17th of May, and appearing, on the face of it, to have been made at the petty sessions held on that day. The proper recognizance was entered into on the 21st of May.

Upon the hearing the appeal at the quarter sessions, the notice was objected to, as having been given before the order was actually signed by the justices, and also because it was only verbal. The Court of quarter sessions held a verbal notice sufficient, but refused to hear the appeal, because the notice was given before the justices had actually signed the order.

By the 4th section of the statute, the putative father may appeal, "if within twenty-four hours *after* the adjudication and making of any order" on him, he gives notice of appeal to the mother; and the question is, what is to be considered as the time of the adjudication and making the order for the purpose of giving notice of appeal.

In support of the decision of the quarter sessions, the case of the *Queen v. Justices of Flintshire* (a) was cited and relied upon.

It appeared in that case that an adjudication and order

(a) 3 D. & L. 537.

was made upon the putative father on the 24th of June; on the 27th, he was served with a copy of an order, which, on the face of it, was defective; on the same day (the 27th) he was served with another copy of an order, free from the defects, and dated the 24th of June. Within twenty-four hours from the service of the last order, the putative father gave notice of appeal to the mother, which the sessions held to be too late. The late Mr. Justice *Williams*, before whom the case came in the Bail Court, was of opinion, that the term, "making the order," must be understood in its usual sense, and means an order properly made under the hands and seals of the justices, and as the appellant could shew that the order was actually signed on the 27th, the notice was good, though the order was dated the 24th.

As by the terms of the statute, the notice is to be given within twenty-four hours after "the making of the order," and not after the service or notice of the order, unless a reasonable construction is given to those terms, the appeal clause may be made an absolute nullity.

The order, when formally drawn up, and signed in such terms as to make it apparently, as in the present case, a cotemporaneous judgment with that pronounced verbally, and as if it had been written and signed at the moment it was pronounced, may, for this purpose, be intended to have been actually cotemporaneous, even if the statute by the words "making the order," necessarily intended the written order.

This view of the case is not inconsistent with that of *The Queen v. The Justices of Flintshire* which only decided, that notice within twenty-four hours of the actual signature of the order would suffice; nor is any rule of law of which I am aware, or of convenience, violated by holding that the time of the written judgment or order, when the terms are not inconsistent, relates back to the time of pronouncing such judgment or order verbally; and especially where, as in the present case, it was clearly intended that the written order should have relation to the time of the verbal.

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An obvious inconvenience, I may say injustice, would arise from holding that the putative father was bound, in all cases, to give notice of appeal within twenty-four hours from the actual signing of the written order, for it may be impossible for him to know when that was, and he may be purposely kept in ignorance until too late.

I may observe, that the case of *The Queen v. Justices of Derbyshire (a)*, is an authority in point to shew that a notice within twenty-four hours from the service of the order would be too late, and that the time runs from the making. I, therefore, think that the rule should be absolute.

Rule absolute.

(a) 7 A. & E. 193.

BLACKETER v. GILLET.

January 15.

[In the Common Pleas.

Coram *Wilde, C. J., Maule, J., Cresswell, J., and Williams, J.*]

A count alleged that the defendant, contriving to disturb the plaintiffs in the enjoyment of their ferry, injuriously and against their will carried passengers

CASE for disturbance of a ferry.

across the river near the plaintiff's ferry, per quod they had been deprived of profits of the ferry, and disturbed in the possession of it. Held, upon motion in arrest of judgment, that the count disclosed a good cause of action, and was not bad for omitting to aver that the defendant in carrying near the plaintiff's ferry, either intended to defraud the plaintiffs, or to set up a new ferry (a).

The first count of the declaration, after stating that the plaintiffs were entitled, as the trustees for the Society of Free Watermen of the River Thames, residing at Greenwich, to the fee simple and inheritance of an ancient ferry called Potters' Ferry, for foot passengers, &c., across the

(a) *Plm v. Curell*, 6 M. & W. 234. *Chamberlaine v. The Chester and Birkenhead Railway Company*, 1 Exch. 870.

Thames, to and from a place in the Isle of Dogs, Stepney, from and to Greenwich, &c., taking for the carriage, &c., certain reasonable freights and ferryages, &c., averred that the defendant, not being one of the free watermen aforesaid, but well knowing the premises, and contriving to disturb and injure the plaintiffs in the peaceable enjoyment of their said ferry, heretofore, to wit, &c., and on divers other days, &c., injuriously and wrongfully carried and conveyed divers foot passengers across the Thames, upon the said part of the same river where the plaintiffs had such ferry as aforesaid, and upon the said ferry of the plaintiffs; per quod the plaintiffs had been deprived of divers profits, &c.

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Second count: that plaintiffs so being entitled, to wit, as trustees for the said society, to the fee simple and inheritance of the said ferry as aforesaid, the defendant not being one of the free watermen as aforesaid, but well knowing the premises, and further contriving to disturb and injure the plaintiffs in the peaceable and lawful enjoyment of their said ferry, heretofore, and whilst the plaintiffs were so entitled as trustees as aforesaid to the fee simple and inheritance of the said ferry, to wit, on, &c., and on divers other days and times, &c., injuriously and unlawfully, and against the will of the plaintiffs, carried and conveyed, in a certain boat of him, the defendant, divers foot passengers for hire, over and across the said river Thames, *near* to the said part of the same river, where the plaintiffs had such ferry as aforesaid, and *near* to the said ferry of them the plaintiffs; by reason whereof the plaintiffs have been deprived of divers other profits and emoluments, which would have arisen and accrued to them from the enjoyment of their said ferry, and have been and are greatly prejudiced and disturbed in the possession thereof, and their right and title thereto (*a*).

Plea. Not guilty. Issue thereon.

Upon the trial at the Middlesex sittings after Michaelmas

(*a*) See 2 *Chit. on Plead.* 623, 7th ed.

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Term, 1849, before *Wilde*, C. J., the jury found a verdict for the defendant upon the first, and for the plaintiffs upon the second, issue.

Peacock, on behalf of the defendant, now moved for a rule to arrest the judgment. The second count discloses no cause of action. It merely alleges that the defendant carried *near* the plaintiff's ferry, and that is not enough to give the plaintiffs a right of action. It ought to have alleged, either that the defendant had set up a new ferry, or that he had carried, near the old ferry, with intent to defraud the plaintiffs. It would be no disturbance of this ferry to carry a person from the Isle of Dogs, not to a public landing place, but to his own wharf at Greenwich; and yet that would be a carrying *near* the plaintiffs' ferry. In *Tripp v. Frank* (a) it was held, that if there be a ferry from A. to B., persons may, nevertheless, go by another boat from A. to C., though C. lie near B., provided it be not done fraudulently, and as a pretence for avoiding the regular ferry. The second count should have averred that the carrying near was done with that view. [*Maule*, J.—The declaration alleges, that by the conduct of the defendant the plaintiffs were disturbed in their ferry. That is a question of fact, which must be proved. If the defendant had merely carried a gentleman to his country house, that would not have been a disturbance of the ferry, and the defendant would have been entitled to the verdict. The disturbance is necessary to be alleged, and necessary to be proved.] In the supposed case, it is submitted, there would have been a disturbance, for the plaintiffs would have lost the toll, which, but for the act of the defendant, they would have received; nevertheless, it would not have been such a disturbance as would have given the plaintiffs a right of action. It is not every disturbance, by carrying near a ferry, which gives a right of action; to give such a right, the dis-

(a) 4 T. R. 666.

turbance must amount to setting up a new ferry. [*Maule, J.*—The declaration, in averring that the defendant carried near the plaintiffs' ferry, does, in substance, allege that he set up a new ferry.] In *Huzzey v. Field* (a), Lord Abinger, after stating that the construction of a new landing place, near one of the termini of a ferry, and carrying passengers from the other terminus to that new landing place, would, under certain circumstances, amount to a disturbance of the ferry, says, "It does not follow from this doctrine, that if there be a river passing by several towns or places, the existence of a franchise of a ferry over it, from a certain point on one side to a point on the other, precludes the King's subjects from the use of the river, as a public highway, from or to all the towns or places on its banks, and obliges them, upon all occasions, to their own inconvenience, to pass from one terminus of the ferry to the other. The case of *Tripp v. Frank* (b), decided otherwise; and it is not intended to question that decision." [*Maule, J.*—The declaration states that there was a carrying *near*; that may or may not be a disturbance. Then it goes on to restrict that allegation, by stating that it was such a carrying as amounted to a disturbance. *Wilde, C. J.*—Was it not for the jury to say whether the defendant carried *so near* the ferry as to amount to a disturbance of it? And would it not have been the duty of the Judge so to leave the question to them?]

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PER CURIAM.

Rule refused.

(a) 2 C., M. & R. 432, 442.

(b) 4 T. R. 666.



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DYE v. BENNETT.

[In the Common Pleas.

Coram *Wilde, C. J., Maule, J., Cresswell, J., and Williams, J.*]

The Court granted, on the application of the defendant, and without imposing any terms upon him, a commission to examine witnesses abroad, although the affidavit in support of the application did not shew that the evidence of the witnesses would be admissible in the cause, and although the witnesses resided at a great distance, and considerable delay would be occasioned by the commission being granted.

HUNTER, on a former day in this Term, obtained rule, calling upon the plaintiff to shew cause why a writ, the nature of a mandamus, to examine witnesses at Sydney New South Wales, should not issue, and why all proceedings should not, in the meantime, be stayed. The rule was obtained upon the affidavits of the defendant and attorney, which stated that John Spinks, an officer in Majesty's Customs, at Sydney, and several other persons residing at Sydney, were material and necessary witnesses for the defendant, and that without their testimony, the defendant was advised he could not safely proceed to trial. The affidavit of the defendant's attorney also stated, that the action was brought to recover 69*l.* 13*s.* 8*d.*, being the balance claimed by the plaintiff to be due to him as mate of a vessel, and that issue was joined in the cause on the 27th December, 1849 (*a*).

Haynes shewed cause. The affidavits are insufficient. Where the witnesses proposed to be examined reside so great a distance as these do, the affidavits ought not merely to aver that they are material and necessary witnesses, but ought to set forth the facts upon which the averment is grounded. [*Wilde, C. J.*—The defendant

(*a*) The rule was in the first instance refused, because the affidavits, which were in the common form, (see *Chitty's Forms*, p. 68, 6th ed.,) did not state that the issue had been joined in the cause. See *Mondell v. Smith* 9 Dowl. 812; S. C. 8 M. & W. 300, and *Clutterbuck v. Jones* 6 D. & L. 251.

a right to have a commission sent out; and the fact that the witnesses live at a great distance, and that a long time will consequently be necessary to take their evidence, does not deprive him of that right.] Where a witness resides abroad, at such a great distance that a commission sent out to examine him will necessarily occasion great delay, it is not a matter of course to grant a commission on the application of a defendant. It must be made out to the satisfaction of the Court that the evidence of the witness would be admissible, and of service to the defendant when obtained; *Lloyd v. Key* (a). The affidavits do not shew this. [*Cresswell*, J.—They state the name of the man whose evidence is required, and you do not shew that he cannot be material or necessary. In *Lloyd v. Key*, there must have been affidavits shewing grounds for believing that the witness would not be material or necessary.] The Court will, at all events, not make this rule absolute, except upon the terms of paying the money into Court; *Cow v. Kynnersley* (b). [*Wilde*, C. J.—In that case the Court did not require the money to be paid into Court, but the affidavits being very defective, the defendant, in order to induce the Court to grant him a commission, offered to pay the amount into Court.

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Hunter, contra, referred to *Healy v. Young* (c).

PER CURIAM.

Rule absolute.

(a) 3 Dowl. 253.

Scott, N. R. 892; 6 M. & G. 981.

(b) 1 D. & L. 906; S. C. 7

(c) 2 C. B. 702.



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ROBINSON v. BURBIDGE and Another.

[In the Common Pleas.

Coram *Wilde, C. J., Maule, J., and Cresswell, J.*]

It is no objection to a Judge's order charging stock standing in the name of the accountant general, that the order nisi requires the debtor to shew cause on a day, and not "within a time" named in the order.

Nor that such order purports to be made in pursuance of the 1 & 2 Vict. c. 110, alone, and not also of the 3 & 4 Vict. c. 82.

A judgment was entered in the Master's book as in a cause of "A. v. B." The plaintiff obtained an order to charge stock of the defendant standing in the name of the accountant general, which order was intituled "A. v. C. sued as B."

A rule to rescind it having

been obtained on the ground that it did not follow the judgment in its title, the plaintiff produced the judgment paper, which was intituled in the same way as the order. *Held*, that the order was properly intituled.

Semble, that such an order is in the nature of a writ of execution, and ought to follow the judgment in its title.

The words "C. sued as" appeared to have been interlined: *Held*, per *Wilde, C. J.*, that such interlineation must be presumed to have been made before the judgment paper was sealed by the Court.

HONYMAN, on a former day in this Term, applied for a rule nisi to rescind two orders made by *Talfourd, J.*, under the following circumstances. Judgment having been entered up on the 25th of May, 1849, upon a warrant of attorney against the defendants, the plaintiff, in the month of January following, obtained the following order:—

William Robinson

v.

Edward Francis Burbidge,
sued as Edward Francis Burbridge,
and Thomas William O'Keefe.

On reading the affidavit of the plaintiff I do order, unless cause be shewn to the contrary before me or

such other Judge as shall be in attendance at the Judges' Chambers, Rolls' Garden, Chancery Lane, on Monday, the 14th day of January instant, at three of the clock in the afternoon, by the defendant Burbidge, his attorney or agent, that the sum of 27,064*l.* 16*s.* 11*d.* Bank 3*l.* per cent. annuities, remaining on the credit of the cause *Burbidge v. Burbidge*, pending in the High Court of Chancery in the name of the Accountant General of that Court, "the legacy account" shall be, and shall in the meantime stand charged with the payment of the sum of 4,000*l.* to the plaintiff, being the amount for which judgment has been recovered in this cause, and 3*l.* 10*s.* costs, and interest thereon, pursuant to the statute 1 & 2 Vict. c. 110. Dated the 3rd day of January, 1850.

T. N. TALFOURD.

The affidavit upon which this order was made, was intituled in the same way as the order, and stated that "judgment was signed in this cause against the above named defendants." The defendant Burbidge, upon being served with the above order, gave the plaintiff notice that he would attend by counsel at the Judges' Chambers on the 9th of January, for the purpose of shewing cause against it. The plaintiff, however, in reply, declined to attend on any other day than that mentioned in the order; notwithstanding which, Burbidge attended on the 9th. The plaintiff did not attend, and *Maule*, J., the Judge in attendance, refused to hear the defendant's counsel. Burbidge then gave the plaintiff notice that he should not shew cause against the order on the 14th, and that in the event of its being made absolute, he should apply to the Court to set it aside. The order was made absolute on the 14th, on the usual affidavit of service; and this second order was intituled in the same way as the former one. The affidavits upon which the present rule was obtained, were intituled in the same way as the orders; and besides setting forth the foregoing facts, stated that the defendant's attorney had searched the judgment books of the Masters of the Court, and "that no judgment had been signed in this Court in this cause, or in any action at the suit of the plaintiff against Edward Francis Burbidge and T. W. O'Keefe, or at the suit of the plaintiff against Edward Francis Burbidge, sued as Edward Francis Burbridge, and T. W. O'Keefe, but that the deponent found that judgment was signed at the suit of the plaintiff against Edward Francis Burbridge and another."

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Honyman contended, that the orders were bad on three grounds. First, the orders are wrongly intituled. Orders charging stock under the 1 & 2 Vict. c. 110, are in the nature of writs of execution, which, it is well established, should correspond with the judgment in the name of the defendant, although he be therein described by a wrong

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one; *Reeves v. Slater* (a); *Fisher v. Magnay* (b); 1 *Chit. Archb.* 534, ed. 1847. In *Tagg v. Simmonds* (c), the names of the defendants were Simmonds and Prickett, but they appeared and pleaded to a writ and declaration which described them as Simmonds and Hemming. Judgment having been afterwards signed for want of a rejoinder, a rule which they obtained to set aside the judgment, upon affidavits, intituled "*Tagg v. Simmonds and Prickett*, sued as *Hemming*," was discharged upon the ground that the affidavits were wrongly intituled. The plaintiff's proper course in the present case, was to obtain an order in the cause of *Robinson v. Burbridge*, which is the title of the cause in which judgment has been signed. [*Cresswell*, J.—It would have been found that there was no stock standing in the name of Burbridge.] The identity of Burbridge and Burbridge might have been established by affidavit. [*Maule*, J.—This stock is standing in the name of the Accountant General, and not in that of Burbridge, so that no difficulty would have arisen from intituling the order in the same way as the judgment. But even if it had stood in the name of Burbridge, there would have been no more difficulty than in the case of a person changing his name after judgment.] Secondly, the order purports to be made only under the 1 & 2 Vict. c. 110, and not under the 3 & 4 Vict. c. 82. The 14th section of the former act authorizes the charging of stock only when standing in the name of the judgment debtor, or of any person in trust for him. Here the stock is not so circumstanced, and the act therefore, does not apply to it. The subsequent statute however, extends the provisions of the earlier one to stock standing in the name of the Accountant General, and as the stock in this case stands in the name of the Accountant General, the orders of *Talfourd*, J., ought to purport to be made in pursuance of the later act, as well as of the

(a) 7 B. & C. 486; S. C. 1 M. & L. 40; 6 Scott, N. R. 588. & R. 265.

(c) 4 D. & L. 582.

(b) 5 M. & G. 778; S. C. 1 D.

1 & 2 Vict. c. 110, instead of purporting to be based upon the last mentioned statute only. [*Maule, J.*—The 3 & 4 Vict. c. 82, recites the provisions of the 14th section of the former act, and after stating that doubts exist whether those provisions “extend to the cases hereinafter mentioned,” enacts, “that the aforesaid provisions” “shall be deemed and taken to extend,” among other things, to stock standing in the name of the accountant general. Then, in obedience to this act of Parliament, I “deem and take” the 14th section of the 1 & 2 Vict. c. 110, to extend to stock in the accountant general’s name; and, therefore, the orders of *Talfourd, J.*, are rightly made in pursuance of the earlier act.] Thirdly, the first order was not made in a form sanctioned by the act, and consequently the second order was made without jurisdiction.

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Rule nisi granted upon the first and third grounds, and refused on the second.

On the same day that the rule was obtained, the plaintiff served at the office of the defendant Burbidge’s attorney a rule which he had obtained on the preceding day, making the orders of *Talfourd, J.*, a rule of Court. The defendant Burbidge thereupon gave the plaintiff notice not to appear to the above rule nisi, and upon a subsequent day,

Whitehurst, upon an affidavit that Burbidge had no notice of the plaintiff’s rule at the time when the motion for the above rule nisi was made, obtained a fresh rule nisi to rescind the orders of *Talfourd, J.*, and to discharge the rule making them a rule of Court.

Affidavits in answer were made by the plaintiff and his attorney, setting forth the judgment verbatim, and stating, among other things, that it had been signed against Burbidge by the name of “Burbridge,” in consequence of the latter name having been inserted in the body of the warrant of attorney, although that instrument was signed in the former name. Upon cause being shewn, the original judgment-paper was produced, and appeared to be as follows:—

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Final judgment on warrant of attorney for 4,000*l.* in debt.

The 25th day of May, A. D. 1849.

Middlesex, } William Robinson, the plaintiff in this suit,
to wit. } by B. M. his attorney, complains of *Edward*
Francis Burbidge, sued as Edward Francis Burbidge, *and*
Thomas William O'Keefe, the defendants in this suit, who
have been summoned,” &c. A declaration in debt was
then set out, followed by the default of the defendants, after
which it proceeded to state, “ Therefore it is considered
that the plaintiff recover against the defendants his said
debt,” &c. The words in italics were interlined, and the
whole document appeared to have been framed originally as
a judgment against one defendant only, and to have been
afterwards altered to make the language applicable to the
case of two defendants; words in the singular number being
changed into the plural.

Humfrey and *G. Hayes* now shewed cause. The judgment-paper itself is the best answer to the objection that at the order does not follow the judgment. That objection was made under a misapprehension of the facts, but even if it were well founded, the defendant Burbidge is not in a position to avail himself of it, for his affidavits are intituled in precisely the same way, and if that title be wrong, they cannot be read. With respect to the Judge's jurisdiction to make the orders, it is doubtful whether the Court has any power whatever over them. In *Witham v. Lynch (a)*, the Court of Exchequer intimated much doubt as to the jurisdiction of the Courts over orders similar to these. *Alderson*, B., said, in the course of the argument, “ Have we any jurisdiction over these orders? They are not orders over which this Court can exercise any control, but orders to be enforced by the Lord Chancellor. Our jurisdiction only extends to cases where the order of the Judge must be

(a) 1 Exch. 391, 9.

considered as the act of the Court." [*Maule*, J.—But I observe that *Parke*, B., immediately answers, "Whenever a jurisdiction is conferred by statute on a Judge of the superior Courts, it is subject to appeal to the Court, unless there is something in the context leading to a contrary conclusion." *Cresswell*, J.—And *Rolfe*, B., says, "The plaintiff had better not force the Court to a decision on the point," which shews that he had not much doubt as to the jurisdiction of the Court to rescind the order, if necessary.] At all events, the Court did not interfere with the Judge's orders in that case, and some doubt was expressed as to their power to do so. [They were stopped by the Court on the question of the validity of the orders.]

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Whitehurst and *Honyman*, in support of the rule. First, there was no judgment in the cause in which the orders are made. The entry in the Master's book shews that the judgment was signed by "Robinson against Burbridge," and although the judgment-paper describes the defendant as "Burbidge, sued as Burbridge," it is to be observed that the words "Burbidge, sued as," are interlined, and the plaintiff's affidavits do not give any explanation of the circumstances under which the interlineation was made. [*Maule*, J.—It was irregular to produce that judgment-paper. *Wilde*, C. J.—It is a document bearing the seal of the Court. *Maule*, J.—But it is a paper prepared by the person who produces it, and it is kept in his custody.] It is not shewn that the interlineation existed when the document was stamped with the seal of the Court; and, in the absence of evidence on the subject, (which it was the duty of the plaintiff to supply, as the defendant could not file affidavits in reply), the Court will presume that the interlineation was made subsequently to the sealing. The judgment-paper then, read without the interlined words, will correspond with the entry in the judgment-book, and the case will stand as it did at the outset, upon the defendant's affidavits alone.

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The orders, then, are bad for not following the judgment; and it is no answer to this objection that the defendant's affidavits are intituled in the same way as the plaintiff's. The question is not, whether there be such a cause as "Robinson and Burbidge, sued as Burbridge," but whether there be a judgment in that cause. The defendant Burbidge is not concerned to deny that there is such a cause: the affidavits, on both sides, may be taken to be correctly intituled; but he contends, that when those affidavits are read, they shew that there is no judgment in the cause of "Robinson v. Burbidge, sued as Burbridge," in which the orders are made. Those orders, therefore, are wrongly intituled, for they do not follow the judgment. [The authorities cited upon moving for the rule were again referred to; but as the Court gave no judgment upon the point, the argument upon it is omitted.]

Secondly, the orders of *Talfourd, J.*, are bad. The 15th section of the 1 & 2 Vict. c. 110, enacts, that the Judge's order to change stock shall be made in the first instance ex parte, and without any notice to the judgment debtor, and shall be an order to shew cause only; and that unless the judgment debtor shall, "within a time to be mentioned in such order," shew cause to the contrary, the said order shall "be made absolute." Now, the order nisi in this case, requires cause to be shewn, not "within a time" "mentioned in such order," as the act directs, but upon a day therein mentioned. It is, therefore, bad, for not pursuing strictly the provisions of the statute. The Judge's authority to make these orders is founded exclusively upon the act; they ought, therefore, to comply strictly with its provisions, otherwise they are made without jurisdiction. And this objection is not merely technical; for the same section enacts, that the order nisi "shall restrain the governor and company of the Bank of England from permitting a transfer of such stock in the meantime and until such order shall be made absolute or discharged;" so that a very substantial injury may be inflicted upon the

person against whom an order nisi is obtained, if he is not to be at liberty to shew cause against it at any time from the moment the order is made. [*Wilde*, C. J.—Is there any instance of an order to shew cause “within a time?”] In *Morris v. Manesty* (a), the order was to shew cause “within six calendar months;” and in *Fowler v. Churchill* (b), it was, “within a month.” If this order be valid, an order to shew cause three years hence would be equally valid, and a person, against whom such an order may be obtained, must submit to have his stock locked up for three whole years, and to be deprived of the power of dealing with it during the whole of that time. If the order is to be read as directing cause to be shewn on “or before” the 14th of January, then the second order was wrongly made, for the defendant Burbidge attended, in compliance with it, on the 9th, and therefore the event upon which the order was to be made absolute did not happen. The plaintiff is in this dilemma: if the first order allowed cause to be shewn only on the 14th, the Judge had no jurisdiction to make it in that form, and it is, therefore, bad; if, on the other hand, cause might have been shewn, at any time before the 14th, the second order is invalid, for Burbidge was ready to shew cause on the 9th, and *Maule*, J., ought to have heard him on that day. [*Cresswell*, J.—Why did you not apply on the first day of Term to rescind the order?] Because it had not been made absolute. In *Brown v. Bamford* (c), the Court of Exchequer refused to interfere until the order was made absolute. [*Cresswell*, J.—In *Morris v. Manesty*, the Court of Queen’s Bench rescinded the order nisi, and *Patteson*, J., expressed a doubt whether *Brown v. Bamford* was correctly reported.] When *Morris v. Manesty*, and *Brown v. Bamford*, were referred to in *Witham v. Lynch* (d), *Alderson*, B., said, “*Brown v. Bamford* is right to this extent, that the Court will not interfere until there is

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(a) 7 Q. B. 674.

(c) 9 M. & W. 42; S. C. 1

(b) 11 M. & W. 57; S. C. 2 Dowl. 361, N. S.

Dowl. 767, N. S.

(d) 1 Exch. 391, 400.

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an order absolute." [*Wilde, C. J.*—Your complaint is against the order nisi, and, if you thought it had been wrongly made, you should have come to the Court at once to rescind it. *Maule, J.*—I can very well understand that there may be cases in which the Court will not interfere, except upon the order being made absolute, because the defendant may object to the order nisi only for reasons which he ought to state to the Judge before it be made absolute. But it does not follow that if the order nisi be wrong, the party complaining of it ought not to come a second time to have it rescinded. There is no case which shews that if the Judge was wrong in making the order nisi, the defendant cannot come to the Court to set it aside before it is made absolute.] At all events, the defendant *Burbidge* was not bound to come until the order was made absolute. The order nisi is in the nature of a summons, and it is not necessary, in any case, to rescind a summons.

WILDE, C. J.—This rule must be discharged. It seems to me that no sufficient objection has been pointed out to the orders of my Brother *Talfourd*. The 1 & 2 Vict. c. 110, s. 15, enacts, that there shall, in the first instance, be an order nisi, requiring the defendant to shew cause why stock shall not be charged "within a time to be mentioned in such order;" and, it is contended, that the true construction of that enactment is, that the order nisi or summons must require the defendant to shew cause, not upon some day to be named in it, but at any time within a day named; so that the whole interval of time, between the day of making the order and the day named in it for shewing cause, is to be open to the defendant to come and shew cause. Such a summons would be a perfect anomaly in the practice of the Courts. The manifest inconvenience with which it would be attended has prevented such a summons having ever been heard of before, and I cannot believe that the Legislature ever intended to introduce such a practice. It merely meant to say, that the Judge should name a reason-

able time for shewing cause. This has been done by the order; and I therefore think, that it satisfies the words of the statute. The defendant is to shew cause "within a time" limited by the "order," and, according to the general practice of the Court, the day mentioned in the order is the time for shewing cause. It may be that the time named is inconvenient to the defendant; but, if so, he ought to state the circumstances to the Judge, and apply to him to change the time. By the 15th section of the act it is enacted, that the "Judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order." It is true, that part of the section is inserted after the passage relating to making the order absolute, but it shews, nevertheless, an intention to intrust a discretion to the Judge similar to that which he has in ordinary cases, viz., to vary his order; and if he may vary the order absolute, he surely may vary the order nisi. I think it was not competent to the defendant to shew cause at any time within the day named, but that he ought to have done so on that day. If he found that day inconvenient, he should have applied to the Judge to vary his order by changing the day; and if the Judge had refused to do so, he might then have come to the Court. But what happens here? An order nisi is made. It is objected to, not because it gives too little, but because it gives too much time for shewing cause. The defendant then says that he went before another Judge, who told him that a day was named in the order, and that he could not hear him before that day. If my Brother *Maule* was wrong in refusing to hear him, he should have come to the Court forthwith. But he does no such thing: he waits until the order is made absolute. Does he shew cause at the time fixed by the order? He allows the time to expire without doing so. And now, after the time for shewing cause has gone by, does he shew that any injustice has been done him? He comes here, in the total absence of merits, and raises objections to the order of a purely technical character.

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If, indeed, those objections were well founded, the Court would not refuse his application merely because they were technical objections; but we have a right to require that a party who comes here with such objections should establish them clearly. And that he has not done. I think the Judge was right in refusing to hear him before the time named in the order, and that the defendant was wrong in not applying to *Talfourd*, J., to change the time if it was inconvenient to him; and that having suffered the time for shewing cause to go by, he is now too late.

With respect to the objection to the title of the affidavits, it is to be observed, that the defendant's affidavits are intituled precisely in the same way as those objected to. Either both are right, or both are wrong. If both are right, there is an end to the objection. If both are wrong, the defendant is not entitled to read his affidavits in support of the present application. It is said, however, that there is no judgment in the cause in which these orders are intituled. But there is an authority by Burbidge to appear for him as "Burbidge," and we have the judgment paper produced—that is, an entry of the proceedings, supposed to be made by the officer of the Court—under the seal of the Court; and it shews that judgment was recovered against Burbidge, sued as Burbidge, and that the orders, therefore, were properly intituled. It appears, indeed, that there is an entry in the Master's judgment-book in which the cause is entered as "Robinson v. Burbidge;" and, in the absence of all evidence, it might be supposed that that was the true title of the cause in which the judgment was entered up. But when the judgment-paper is produced, it shews a judgment corresponding with the authority, and in the form in which it ought to have been entered up. It is true, a part is interlined; but it is not shewn that the interlineations were made after the judgment-paper was stamped with the seal of the Court, and we cannot presume that any person has been guilty of that which would lay him open to serious animadversion. The judgment-paper,

I say, follows the authority; and it does so in this way: the judgment is awarded, not in terms, to A. against B., but the declaration is set out; then the default of the defendants is stated, and then follows, "that the plaintiff do recover against the said defendants." I therefore think, that not only there is an entire absence of merits in this case, but also that none of the technical objections are valid. The rule must be discharged.

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MAULE, J.—I observe that the interlineation is not one which might have been made to serve the turn of this application, for the name of the other defendant is also interlined, which shews that there was a general blundering in writing out the judgment-paper.

With respect to the main question in dispute, there is no doubt that the Court has jurisdiction to set aside an order of a Judge, either nisi or absolute, made under this act. But where there is considerable doubt whether the case is within the act, and that question can be raised before the Lord Chancellor, and decided by him, we ought not to interfere, but leave the question to him.

With respect to the objection, that the order ought to have given the defendant leave to shew cause "within a time," there is nothing in the act to shew that the time for shewing cause must begin from the time of making the order. If it had said, "unless the defendant shall shew cause in the course of next week," it would have done very well; "next week" would have been the time within which he might have shewn cause. The Judge here named the 14th of January, and the defendant might have attended at any time on that day (*a*). I think, therefore, that the order was one which the Judge had authority to make, and that I was bound to refuse to hear the defendant before the time named. There was, then, a regular order to shew cause on the 14th; the defendant did not do so, and the order was,

(*a*) The order named three o'clock. See *ante*, p. 94.

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therefore, rightly made absolute. We have taken the objections which he now makes into consideration, and we think there is nothing in them.

CRESSWELL, J., concurred.

Rule discharged, with costs.

January 30.

READ v. BLAYNEY.

[In the Common Pleas.

Coram Wilde, C. J., Maule, J., Cresswell, J., and Williams, J.]

A cause was tried by the undersheriff on the 7th of June, when the plaintiff obtained a verdict for less than 20*l*. On the 11th of June, judgment was regularly signed, costs taxed, and a *fi. fa.* sued out, which was executed shortly afterwards. On the same 11th of June, the defendant obtained a rule nisi to enter a suggestion to deprive the plaintiff of costs, which was made absolute in the Michaelmas Term following. Upon the motion of the defendant, in Hilary Term, 1850, the Court set aside the judgment and subsequent proceedings.

THIS was a rule calling on the plaintiff to shew cause why the judgment signed in this cause, and the writ of *fi. fa.* issued thereon, should not be set aside, and why the plaintiff should not refund to the defendant the sum of 13*l*. 3*s*. 6*d*., being the amount paid by the defendant to the sheriff of Middlesex under the *fi. fa.*; the defendant undertaking not to bring any action against the plaintiff for or by reason of the judgment and execution.

From the affidavit upon which the rule was obtained, it appeared that the cause was tried before the undersheriff upon a writ of trial on the 7th of June, 1849, when the plaintiff obtained a verdict for less than 20*l*.; that the writ was returnable on the following day; that judgment was signed, the costs taxed, and a *fi. fa.* sued out on the 11th of June; and that the sheriff levied the amount of the debt and costs on the 25th of the same month. It also appeared, that upon the 8th of June the defendant and his attorney made affidavits in support of a rule to enter a

absolute in the Michaelmas Term following. Upon the motion of the defendant, in Hilary Term, 1850, the Court set aside the judgment and subsequent proceedings.

suggestion on the record to deprive the plaintiff of costs, and that a rule for that purpose was obtained on the 11th, served on the plaintiff on the 14th of the same month, and made absolute on the 20th of November.

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Joyce shewed cause. By the 3 & 4 Wm. 4, c. 42, s. 18, judgment may be signed and execution issued as soon as the writ is returnable, unless the sheriff or Judge of his Court orders judgment or execution to be stayed. Here the undersheriff, who tried the cause, did not make any such order, although the defendant applied to him to do so; and judgment, which might have been signed on the 8th, (*Gill v. Rushworth* (a),) was regularly signed on the 11th of June. The defendant, it is admitted, was in time when he moved for a rule to enter a suggestion, but he ought to have applied at the same time to set aside the judgment "if entered up," as was done in *Vicars v. Mould* (b). In *Soames v. Cooper* (c), the Court of Exchequer discharged a rule for entering a suggestion, on the ground that it ought to have been framed to set aside the judgment on payment of costs, and then to enter a suggestion. The defendant does not explain why he did not move before the 11th of June for the rule to enter a suggestion, nor why his attorney did not give the plaintiff's attorney notice on the morning of the 11th, when he attended the taxation of the costs, of his intention to move. The defendant has conducted himself vexatiously throughout. He abstained from taking any step after the trial, until the plaintiff had incurred every possible expense, by signing judgment, taxing costs, suing out a fi. fa., and getting it executed, without giving him any intimation of his intention to apply to enter a suggestion; and it is, therefore, submitted, that he is not entitled to any indulgence.

Corrie, in support of the rule. It is admitted that the plaintiff was at liberty to sign judgment on the 8th of June, and consequently that he was regular in signing it on the 11th.

(a) 2 D. & L. 416.

(b) Exch., Hil. Term, 1849.

(c) 3 Exch. 38; S. C. 6 D.

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But the defendant is not on that account to lose his right of entering a suggestion to deprive the plaintiff of his costs. The defendant can lose that right only by his own act; and if he has conducted his proceedings with regularity, if submitted he is entitled to have this rule made absolute. His proceedings have been perfectly regular; for, the day after the trial, he prepared the necessary affidavits in support of a motion for a suggestion, and obtained the rule nisi on the 11th. Suppose that the rule had been a rule for a new trial, and not for a suggestion, the fact of judgment having been signed before the rule was obtained, would not have deprived the defendant of his right to a new trial, nor would the plaintiff have been entitled to the costs of signing judgment. If the trial had taken place on the 7th of July instead of the 7th of June, the plaintiff would have been equally entitled to sign judgment upon its return on the following day, to tax his costs, and to sue out execution; but the defendant would not, on that account, have been prevented from obtaining a rule for a new trial in Michaelmas Term following. It is said that the defendant's motion for entering a suggestion was wrongly framed, as it did not also seek to set aside the judgment; but *Soames v. Cooper* (a), which was cited in support of that proposition, differed from the present case, in the fact that the judgment had there been signed before the motion was made, while here it was signed only at the very time that the rule nisi was granted.

WILDE, C. J.—This rule must be made absolute. It appears that the defendant came within the time allowed by the practice of the Court, to move to enter a suggestion, and established his right to it; and, to give him the benefit of that to which he has a right, the judgment and subsequent proceedings must be set aside. It is true, if the judgment was regular at the time when it was signed; but it was signed on speculation, and subject to the risk of being

(a) 3 Exch. 38; S. C. 6 D. & L. 238.

set aside. It was signed at the hazard of its turning out to be ineffectual if a suggestion was subsequently entered. With respect to the objection, that the defendant did not give the plaintiff notice of his intention to move to enter the suggestion, he was not bound to do so; there is no rule of Court which requires it.

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MAULE, J., CRESSWELL, J., and WILLIAMS, J., concurred.

Rule absolute (*a*).

(*a*) See *Bugg v. Scott*, Bail Court, Trinity Term, *post*.

STEAD v. ANDERSON.

January 30.

[In the Common Pleas.

Coram *Wilde, C. J., Maule, J., Cresswell, J., and Williams, J.*]

THIS was a petition presented, under the 32 Geo. 2, c. 28, s. 11 (*a*), by the plaintiff in the above cause, a prisoner in the Queen's prison, praying that he might be removed from a certain ward in Class 1, of that prison, to the general prison.

The following facts appeared from the petition and affidavit of the petitioner. Judgment was given for the defendant in the cause of *Stead v. Anderson*, and the plaintiff was taken in the month of November, 1847, under a *ca. sa.*, for the non payment of the defendant's costs, and committed to the Queen's prison, where he remained until the present time. On the 21st of September, 1847, a

The 11 & 12 Vict. c. 7, s. 2, enacts, that from and after the passing of the act, the first class of prisoners in the Queen's prison shall be composed of, among other persons, debtors refusing to file a schedule of their property when ordered to do so.

Held, that an insolvent debtor who had been ordered to file his schedule before the passing of the act, was properly placed in the first class.

(*a*) Which enacts, that the superior Courts in Term time, and the Judges in Vacation, &c., may, upon the petition of a prisoner complaining of any abuse of authority on the part of his

gaoler, examine into the matter in a summary way, and make an order for redressing the abuse, punishing the gaoler, and making reparation to the prisoner.

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vesting order of his estate and effects was made by the Court of Insolvent Debtors, under the 1 & 2 Vict. c. 110, s. 36, upon the petition of the defendant, as detaining creditor, and was left at the Queen's prison on the 23rd of the same month. By an order of the same date, and indorsed upon the vesting order, the prisoner was required to file his schedule, under the 69th section of the 1 & 2 Vict. c. 110, within fourteen days after notice of the order. The defendant did not obey it; and in July, 1848, he was removed from the general prison, in which he had up to that time been confined, to a ward in Class 1, in which the treatment of the prisoners was much more severe. The petition then described the cheerfulness of the general prison, the facilities for exercise, and the access to good water which it afforded, together with other circumstances, which rendered it comparatively comfortable; and then gave a detailed account of the ward in which he was now confined; stating, among other things, that the aspect of the building was more gloomy, the space allotted to exercise more limited, and the allowance of beer and wine less ample than in the general prison: from which, and other circumstances of comparative hardship, the prisoner's health had suffered.

Watson and *Unthank*, on behalf of the keeper of the Queen's prison, in opposition to the petition. The question is, whether the keeper of the prison was right in placing the prisoner in Class 1? Before the passing of the 1 & 2 Vict. c. 110, no person was entitled to take the benefit of the acts for the relief of insolvent debtors, unless he was in custody, and then only upon his own petition. The 36th section of that act, for the first time, gave the Insolvent Debtors' Court the power of making a vesting order upon the petition of a detaining creditor, against his debtor in custody, and also the power of requiring the debtor to file a schedule of his property. But until such schedule be filed no further proceeding can be taken. By section 36 the

petition, to be presented by the detaining creditor, is to state that the creditor is desirous that the prisoner shall be ordered to file his schedule, and that he shall "thereupon be brought up," before the Court. Those words, and the 70th section, which enacts, that "after such schedule shall have been filed," the prisoner shall be brought up, as well as the 71st and 72nd sections,—which require, that notice of the filing of the schedule, and of the time and place appointed for bringing up the prisoner shall be given to the creditors, and that upon his being brought up the schedule shall be examined,—all shew that the filing of the schedule is a condition precedent to the taking of any other step; and that until that be done, the Insolvent Debtors' Court is not seised of the cause, and cannot deal with the prisoner. [*Wilde*, C. J.—Is there any provision that a person may be brought up and committed for refusing to file his schedule?] No: there is no means of compelling him to file his schedule. In that state of the law the 5 & 6 Vict. c. 22, was passed; and by the 17th section of that act, the prisoners in the Queen's prison were directed to be divided into seven classes; the first of which was to be composed of "debtors remanded by the commissioners of the Court for the relief of insolvent debtors, on the ground of fraud, or for refusing to file a schedule of their property." As, however, the Court of Insolvent Debtors has no power to "remand" a prisoner,—for if his petition be dismissed he is not "remanded," but remains in custody under the *ca. sa.* under which he was taken,—a doubt arose, as to whether debtors whose petitions had been dismissed fell within the 1st Class; and the 11 & 12 Vict. c. 7, was therefore passed, (royal assent, March 28, 1848), which enacted, (section 2), that the first class of prisoners should be composed of three descriptions of persons, the second of which descriptions is, "debtors refusing or neglecting to file a schedule of their property when ordered to do so by the Court for the relief of insolvent debtors under the provisions of the 36th section of the 1 & 2 Vict. c. 110." The prisoner falls within that

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description, and was, therefore, properly transferred from the general prison to the ward in which he is now confined. It will be contended that the act is not retrospective, and applies only to persons who, after the passing of the act, neglect or refuse to file their schedule, and that inasmuch as the prisoner's refusal or neglect took place before the act passed—since he was in contempt on the fifteenth day after the 23rd of September, 1847—he is not affected by its provisions. There are two answers to this objection. First, the object of the act is to classify prisoners, not to punish them; and its language clearly applies to all persons whom the gaoler had in his custody when the act passed. It does not direct the gaoler to classify all persons who shall come into his custody after the passing of the act, but enacts, that “from and after the passing of this act the first class of prisoners” shall consist of certain descriptions of persons, and the gaoler was bound to place in that class all persons answering those descriptions who were in his custody when the act received the royal assent. But, secondly, even if the act be applicable only to persons coming within the descriptions in question after the passing of the act, the prisoner comes within its provisions, for his refusal or neglect to file his schedule is a continuing refusal or neglect *de die in diem*, and he has, therefore, refused and neglected since, as well as before, the passing of the act.

Pashley, in support of the petition. The prisoner has been illegally placed in Class 1. When he was committed to the Queen's prison, that class consisted only of debtors “remanded” by the Insolvent Debtors' Court. It is said, that that Court has no power to remand, and that the 1 & 2 Vict. c. 110 does not contemplate the bringing up of a prisoner until after he has filed his schedule: but it is submitted, that the power of remanding is incidental to the duties which that Court has to discharge; and further, it seems clear from several passages in the 1 & 2 Vict. c. 110, that the Legislature contemplated that a debtor might be

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brought up before he filed his schedule. The 69th section, which provides that the prisoner shall file a schedule of his property within fourteen days, "or within such further time as the said Court shall deem reasonable," seems to give the prisoner the power of applying for such further time, and consequently shews that he may come to the Court before filing his schedule. Again, the 36th section points to the same thing when it provides, that the "Court shall and may require such prisoner to file his schedule; and shall and may cause such prisoner to be brought up to be dealt with according to this act, and all things to be done thereupon or preparatory thereto." The words "preparatory thereto" must mean "preparatory to filing the schedule." [*Cresswell*, J.—I read the passage differently. "Thereupon," I understand to refer to his being brought up, and "or preparatory thereto," to mean "preparatory to his being brought up."] At all events the word "remanded" is used in the 5 & 6 Vict. c. 22, in the popular sense, and applies to a person who, after having been brought up before the Court, has been taken back to prison; and as the prisoner never was brought up, he never was "remanded," and he consequently does not fall within Class 1 of the earlier act. The 11 & 12 Vict. c. 7, it is true, comprises within the first class debtors refusing or neglecting to file their schedule when ordered to do so; but these latter words must be understood as referring to an order to be made after the passing of the act, otherwise the Court will give a retrospective operation to an act of a penal nature. [*Maule*, J.—It will not do, according to your argument, to have the order before, and the neglect after, the passing of the act.] That is the contention. [*Maule*, J.—Then, suppose a person was brought up after the first, and before the second act, and was remanded for refusing to file his schedule; in that case he, indisputably, is properly put into Class 1: afterwards the second act is passed, which repeals the first, and if the debtor perseveres in refusing to file his schedule, you say the gaoler would be wrong in

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keeping him in Class 1. You are charging the Legislature with an absurdity.] It might be a *casus omissus*. It is not long since the Legislature passed an act of Parliament for Ireland, which was based upon a supposed state of things which had really no existence (a). [*Maule, J.*—You say that the word “ordered” must be confined to orders made after the act: why do you not apply the same principle of construction to the word “debtors,” and say that it refers only to persons who become debtors after the act? You might even go to the extent of saying, that the act only applied to persons who were born, as well as became debtors, after the act.] In 2 *Inst.* 291-2, Lord *Coke*, in commenting on the statute of Gloucester (6 Edw. 1, c. 3), which enacts, that “if a man alien a tenement that he holdeth by the law of England, his son shall not be barred,” &c., says, “this extendeth to alienations made after the statute, and not before; for it is a rule and law of Parliament that, regularly, *nova constitutio futurae formam imponere debet, non praeteritis*.” [He referred also to *Moon v. Durden* (b).] If the act is to be construed as having a retrospective operation quoad the second description of persons, the same construction must be given to it quoad the first and third descriptions. [*Wilde, C. J.*—That does not follow; the persons in those descriptions cannot do any act to relieve themselves,—here the prisoner has the key in his own pocket.]

(a) 9 Geo. 4, c. 82, s. 11, which enacts, that every person “who shall have been assessed or charged by the last rate made at a vestry in the parish,” shall be entitled to a vote for the election of certain commissioners. It appears that such a rate did not exist in any parish in Ireland. “The Legislature has taken for granted that there was a rate in each parish, which, as far as I can learn, does not exist in any

parish in Ireland. In that respect, therefore, the Legislature has been misinformed; and I am of opinion that the *casus omissus* of the Legislature is not to be supplied by any construction which we can give the statute,” per *Crompton, J.*, in *Reg. v. Boston*, 2 *Jebb & Symes*, 675, 680 (Irish); S. C. 3 *Ir. Law Rep.* 478.

(b) 2 *Exch.* 22.

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WILDE, C. J.—It appears to me that this case is free from difficulty, and that the construction to be put upon the statute is plain and palpable. The 36th section of the 1 & 2 Vict. c. 110 provides, that detaining creditors may, in the event of their debtors remaining in custody a certain time without satisfying their debts, apply, by petition, for an order for vesting the real and personal property of the debtor in the provisional assignee; which petition shall, among other matters, state that the party presenting it is desirous that the prisoner shall be ordered to file a schedule of his property, and thereupon shall be dealt with according to the provisions of the act. So that the petition is to express a desire, first, that the prisoner shall file a schedule, and, next, that he shall be brought up before the Court. Thus, it is quite evident that the filing of the schedule shall precede the bringing up of the party before the Court. The 37th section then provides for the vesting of the estate in a provisional assignee; and the 69th enacts, that the prisoner, whose estate is so vested, shall file a schedule containing certain matters relative to the particulars of his estate. Then comes the 70th section, enacting, that after the schedule shall have been filed, the prisoner shall be brought up before the Court according to the provisions of the act; and the 71st provides, that notices of the vesting order, of the filing of the petition, and of the time and place for bringing up the prisoner, shall be given to the creditors. These sections, therefore, form a series of enactments perfectly intelligible and simple, providing that if the debtor does not give his creditors the benefit of the Insolvent Act, they may proceed to call upon the Court to enforce its provisions; and the course for doing so is, in the first instance, to pray for a vesting order, by which the property is taken out of the debtor and vested in the official assignee, and then it is provided that the debtor shall give the particulars of his property. Then, with the view of still further securing to the creditors the benefit of the act, it is enacted, that the debtor shall be

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brought up, and that prior thereto notice shall be given to his creditors: but it was not contemplated that it would be necessary to bring him up before he had given them the means of ascertaining the particulars of his property. It provides a certain time for doing this, and, if further time is required, the Court has a power of extending it, and of giving such further time as it may think reasonable.

The act which more immediately applies to the present cause of complaint is the 11 & 12 Vict. c. 7, which seems to have been directed to the object, not of relaxing the restrictions imposed upon prisoners, but of removing doubts as to their classification,—and it enacts (sect. 2), that debtors “refusing or neglecting to file a schedule of their property when ordered to do so by the Court for the relief of insolvent debtors under the provisions of the 36th section of the 1 & 2 Vict. c. 110,” shall be classed in the first class of prisoners. Now, looking at the provisions of the previous act, little doubt can be entertained that the prisoner is not to be brought up until after filing the schedule; and the question for the consideration of the Court is, whether the words “refusing or neglecting to file a schedule when ordered to do so,” require that the party should be ordered to file his schedule by an order subsequent to the act, or whether the act, finding him “refusing,” does not treat him as a person in that condition, with power to retract his refusal at any time by filing his schedule. I can see nothing in the act requiring that the Insolvent Debtors’ Court should make a second order to do that which it has already properly ordered. It does not seem to have been contemplated that the prisoner should be brought up for the purpose of such second order being made, and I cannot suppose that the Legislature, in passing an act for the purpose of regulating the classification of prisoners, and not of punishing them, would not have enacted in explicit terms that a second order should be made, if they had thought a second order necessary. The act appears, on the contrary, to speak in terms which seem

large enough to embrace an order made before, as well as one after, the passing of the act. Finding persons imprisoned as debtors, it directs the gaoler to classify them in a certain way under certain circumstances: this person was in that condition; and it therefore seems to me that there can be no doubt upon the subject. Looking at the object of both acts, bearing in mind that the object of the classification ordered by the second act, was to make the first act more effectual, there can be no necessity for making a second order, and the petition must therefore be dismissed.

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MAULE, J., CRESSWELL, J., and WILLIAMS, J., concurred.

Watson asked for costs.

Pashley opposed the application.

WILDE, C. J.—I think that when a person makes an application against a gaoler, there ought to be reasonable grounds for making it. When it is considered how subject gaolers are to applications of this kind—how often they may be exposed to applications of the most vexatious and frivolous nature, the Court feels that it is its duty to protect them.

Petition dismissed, with costs.



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Ex parte PARDY.

[In the Common Pleas.

Coram *Wilde, C. J., Maule, J., Cresswell, J., and Williams, J.*]

A warrant of commitment under the 99th and 102nd sections of the County Courts' Act,—following substantially the form settled by the Judges,—stated that the plaintiff had recovered judgment in the County Court; that the defendant personally appeared to the *said* summons, and neglected to pay; that he was then and there examined touching his estate; that the Judge found that he had obtained credit under false pretences, and had made a gift, delivery, or transfer of his property, with intent to defraud his

PARRY, on a former day in this Term, obtained, on behalf of John Stephen Pardy, a rule, calling upon the plaintiff in the above plaint, and the Judge of the Bloomsbury County Court of Middlesex, to shew cause why the defendant should not be discharged from the custody of the governor of the debtors' prison in Whitecross Street.

The facts of the case are stated in the report of an application in the same matter to the Court of Queen's Bench; see *Ex parte Pardy*, ante, pp. 16—19. The rule was granted upon two grounds, viz.: first, that it did not appear on the face of the warrant that the defendant was present at the hearing; and, secondly, that the offence for which he was committed was stated in the disjunctive (*a*)

(*a*) *Parry* had originally moved for a habeas corpus to bring up the body of Pardy; but the Court, thinking none of the grounds urged in support of the motion sufficiently cogent, refused the application but granted the present rule upon the grounds mentioned in the text. Besides these, the following grounds were also urged in moving; but the Court refused to grant the rule upon them. First, that the defendant having been discharged by the Court for the relief of insolvent debtors, the 90th section of the 1 & 2 Vict. c. 110 made him no longer liable to imprisonment for the debt in respect of which the order and warrant of commitment had been made; the 102nd section of the

creditors; that the defendant asked for an adjournment, which was granted; that he did not appear upon the day of the adjournment, and that the Judge then found that he had obtained credit, &c., (as on the first occasion), and ordered him to be committed for forty days.

The order of commitment, which was brought up, stated the offence in the same way as in the warrant.

Held, first, that the personal appearance "to the said summons" referred to the appearance at the hearing;

And secondly, that the order and warrant were not bad for stating the offence in the disjunctive.

The Court at the same time granted a certiorari to remove the order of commitment into this Court ; and the following is the document which was returned in obedience to that writ :—

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County Courts' Act, which enacts that the order or certificate of the Court of Bankruptcy, or for the relief of insolvent debtors, shall not be available to discharge a debtor from commitment, under an order of commitment made by a County Court Judge under the 99th section of the same act, applying only to cases where the order or certificate was obtained after the commitment. [*Maule, J.*—Why did you not apply to the County Court for a summons, calling upon the plaintiff to shew cause why the order of the 18th of January should not be rescinded? Ought not Cubitt to have had an opportunity to dispute the fact that the defendant was discharged?] Even if it was competent to the defendant to make such an application to the County Court, he has nevertheless a right to apply to this Court if he is in fact wrongly imprisoned. [*Maule, J.*—He must make out a *prima facie* case, which he has not done.] Secondly, it does not appear upon the face of the warrant that the defendant was examined upon oath. [*Cresswell, J.*—This was a commitment for not attending in pursuance of a summons issued under the 98th section ; does the act require that the defendant's examination in that case shall be upon oath? *Maule, J.*—Suppose the Judge were to state to a defendant that he was charged with one of the offences mentioned in the 99th section, and the defendant were, in answer, to confess that the charge was true, can it be contended that such confession must be upon oath?] Thirdly, two distinct offences are stated in the warrant,—that defendant obtained credit under false pretences ; and that he made a gift, delivery, or transfer of his property,—and only one penalty is imposed. [*Maule, J.*—For anything that appears upon the warrant, the penalty may have been distributed in the order.] The recital of the order in the warrant must be taken to be correct, and there is nothing upon the face of it from which such a distribution can be inferred. [*Newman v. Bendyshe*, 10 A. & E. 11, 7th objection, p. 15 ; *R. v. Salomons*, 1 T. R. 249, and *R. v. Swallow*, 8 T. R. 284, were cited.]

BLOOMSBURY COUNTY COURT OF MIDDLESEX.

Minute of Judgments and other Proceedings at a Court held at Berners Street, in the said County, on the 18th day of January, 1849, before DOUGLAS DENON HEATH, Esq., Judge of the said Court, and before EDWARD DU BOIS, Esq., Deputy Judge, on the 17th day of January, 1849.

| No. | Plaintif. | Appear- ance. | Defend- ant. | Appear- ance. | Particulars of claim. | Amount claimed. | Special defence. | Day of hearing. | By whom jury required. | For whom judgment given. | Amount of judgment. | Costs. | Order. |
|-----------|------------------------------|-----------------------|-----------------|------------------------------|---|--------------------|--|--------------------|------------------------------|--------------------------------|---------------------------|------------------|--|
| 9219 A | Henry Archfield Compt. | Mr. Dod, Attorney. | John Purdy. | Mr. Goretti, Attorney. | For money had and received by you for the use of the plain- tiff, and for money found to be due from you to the plaintiff on an ac- count stated be- tween you. | £ 4 0 # | Examina- tion under the 16th section. | 18th. | | Plain- tiff. | £ 50 4 10 # | £ 1 6 # | Immediate pay- ment. Commitment to Debtors Prison for 40 days for obtaining credit from plaintiff under false pretences, and for having made a gift, delivery, or transfer of property with intent to defraud his creditors. |

I hereby certify the above to be a true copy of an entry in the Private Book of Judgments, Orders, and other Proceedings of the Bloomsbury County Court of Middlesex, kept by me.

Given under the seal of the Court, this 30th day of January, 1850,

J. WRIGHT, Clerk of the Court.

Udall shewed cause. It sufficiently appears on the face of the warrant (a) that the defendant did appear at the hearing. The 78th section of the County Courts' Act empowers the Judges of the superior Courts "to frame forms for every proceeding" in the County Courts, which forms "shall be observed and used" in all those Courts. This warrant substantially follows the form settled by the Judges, and is, therefore, sufficient. It is objected that the warrant is bad, for not stating with certainty the offence for which the prisoner is committed. The 99th section of the County Courts' Act enacts, that if it appears to the Judge of the County Court that the defendant, in incurring the debt sued for, "has obtained credit from the plaintiff under false pretences," "or shall have made or caused to be made any gift, delivery, or transfer of any property, or shall have charged, removed, or concealed the same, with intent to defraud his creditors, or any of them," it shall be lawful for the Judge to order him to be committed for forty days. The order and the warrant in the present case state, that it appeared to the Judge that the defendant had obtained credit under false pretences, and had made a gift, delivery, or transfer of property, with intent to defraud his creditors. It is objected, that the warrant and order do not state whether the act of the defendant was a gift, a delivery, or a transfer; but it is unnecessary that it should do so. Two distinct offences are stated; first, the obtaining credit under false pretences, for which alone the defendant might have been committed for the whole period of forty days; and, next, the making a gift, delivery, or transfer. The latter statement may be rejected as surplusage. But further, the act in empowering the Judge to imprison a defendant if it appears that he has made a gift, delivery, or transfer of his property, does not require, and the Legislature never intended, that the time of the Court should be occupied in inquiring whether the property has been

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(a) See the warrant set out, *ante*, pp. 17—19.

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disposed of by one or other of the modes mentioned: it is enough if the Judge be satisfied that the property was parted with by any of those modes.

Parry, in support of the rule. The object of giving the Judges power to frame forms of proceeding for the County Courts, was to secure uniformity of practice in all those Courts, and not to confer upon those forms any validity which they would not have at common law; and as this proceeding is not a civil, but a criminal proceeding, *Ex parte Kinning* (a), the warrant must be construed with the same strictness as a conviction at common law. After stating that judgment was recovered by the plaintiff, it says, "and whereas the defendant having personally appeared to the *said* summons;" but as no previous mention is made of a summons, it is uncertain whether the summons referred to was a summons to appear at the trial, or a summons under the provisions of the 98th and 99th sections. Those sections provide, that a judgment creditor may obtain a summons from the County Court to examine his debtor, and that if the latter neglects to attend, or, if upon his attending, the Judge finds that he obtained credit from the plaintiff under false pretences, or that he did any of the other acts there enumerated, the Judge may commit him to prison for forty days. If the proceeding was in fact under the last mentioned sections, then inasmuch as "the said summons" does not distinctly appear to have been a summons under the 98th section, the warrant is bad, for not shewing that such a summons had been issued; and the statement, that the defendant personally appeared does not remove the objection, for the Judge has no jurisdiction to commit the debtor unless the latter has been "so summoned." [*Wilde*, C. J.—Is there not a section which gives the Judge the same power of examining and committing a defendant at the trial, as is given him by the 98th and 99th sections after the

(a) 4 C. B. 507.

trial?]

The 101st section; but the warrant does not state that the defendant appeared at the trial, and it is rather to be inferred from it that the proceeding took place after the trial.

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The warrant, at all events, is bad, for stating the offence in the disjunctive; and it is no answer to this objection, that the whole statement that the defendant had made a gift, delivery, or transfer, may be rejected as surplusage, for the word "thereupon," in the next clause, refers to all the offences. In *R. v. North (a)*, it was held, that an information for selling beer or ale, was bad; and a conviction thereon, shewing that the defendant had sold ale only, was quashed. So in *R. v. Pain (b)*, a conviction for being on board a boat liable to forfeiture for having casks attached thereto "of the description used, or intended to be used, for the smuggling of spirits," was quashed for uncertainty. [*Maule, J.*—In *R. v. North* the conviction was good; but the information was bad, because, being in the alternative, the defendant was supposed to be prejudiced in his pleading. He cannot, however, say that he has been misled, when the offence is stated in the alternative in an order; and if the punishment for either is the same, there is no harm done. *Williams, J.*—It is said in *Paley on Convictions (c)*, "An offence, therefore, cannot be charged *disjunctively*, or in the alternative, in a conviction, though it may be so in an order."] The reason for the distinction is not obvious. It is submitted, that the offence ought to be stated with the same certainty in such an order as this, as in a conviction. *In re Gray (d)* was referred to.

WILDE, C. J.—It does not appear to me that either of the objections on which this rule was granted is sustained. The first objection was, that it did not appear on the

(a) 6 D. & R. 143.

(b) 7 D. & R. 678; S. C. 5 B. & C. 251.

(c) Page 68, 3rd ed. As to the

distinction between convictions and orders. See p. 131, *et seq.*

(d) 2 D. & L. 539.

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warrant that the defendant was summoned, or that he was present at the hearing, or when the order for commitment was made: and it was also insisted that the warrant was bad, because it ought to have shewn that the defendant was summoned or present when the warrant was made.

The proceeding is under the 101st section, which enacts, "that in every case where the defendant in any suit brought in any County Court shall have been personally served with the summons to appear or shall personally appear at the trial of the same, the Judge at the hearing of the cause, or at any adjournment thereof if judgment shall be given against the defendant, shall have the same power and authority of examining the defendant and the plaintiff and other parties touching the several things hereinbefore mentioned, and of committing the defendant to prison, and of making an order, as he might have and exercise under the provisions hereinbefore contained in case the plaintiff had obtained a summons for that purpose after the judgment obtained as hereinbefore mentioned." This section, when speaking of the power of the Judge to exercise the powers "hereinbefore contained," evidently refers to the 98th section, which enacts, that it shall be in the power of any party who has obtained an unsatisfied judgment, to summon the debtor and cause him to be examined. [His Lordship here read the 98th and 99th sections]. Here, then, a power is given by the 98th and 99th sections to summon a debtor, and cause him to be examined in regard to the contracting of the debt, and the particulars of his estate and effects, and as to his having made away with any of his property: and in case the Judge shall be satisfied that the debt was contracted fraudulently, or that the debtor has made away with or concealed his property with intent to defraud his creditors,—in either of those cases the Judge has power to imprison him for forty days. And the act gives the Judge the same power of examining and committing the defendant at the trial.

Now, this warrant appears to have been framed in

pursuance of the form given by the Judges. Generally speaking, the object of providing forms is to avoid the necessity of inserting statements which at common law it would be necessary to insert, and by the omission of which justice was in many instances defeated. This form, therefore, states only such matters as were deemed material in order to satisfy the object of the Legislature. The form is not given to be used at the discretion of the Judge; but the language of the statute is distinct,—it says the form “shall be observed and used in all the Courts holden under this act” (a). The warrant, pursuing the form given by the Judge, as before observed, states that at a Court holden, &c., the plaintiff recovered of the defendant twenty pounds; that the defendant personally appeared and neglected to pay; that the Judge examined him at the time touching his estate, effects, and the circumstances under which he contracted the debt, and found that he had done some of those acts which subjected him to imprisonment for forty days; that the cause was adjourned; that the defendant made default in attending on the next day, and that the Judge then ordered him to be imprisoned for forty days. How does that state of things fall under the 101st section? The personal appearance mentioned in the form given by the Judges evidently refers to personal appearance at the hearing: if it referred to personal appearance at any other time it would be absurd and useless; and the objection that the order was made in the absence of the defendant, is sufficiently answered by the remark, that the circumstances stated on the warrant shew that the Judge had jurisdiction to proceed in his absence.

With regard to the second objection,—that the warrant states that the defendant was guilty of making “a gift, delivery, or transfer” of his property, in the alternative,—it is to be observed, that the object of the enactment is to ascertain whether the debtor has disposed of his property

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(a) Sect. 78.

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in fraud of his creditors, and that it is utterly immaterial whether he disposed of it by one means or another. The object is, to ascertain whether the property has been withdrawn from the creditors by fraud. It might often be very difficult to ascertain precisely whether it was withdrawn by that which was technically a gift, a delivery, or a transfer. Suppose, for instance, that property is sent to a third person, and has not reached his hands; it might be difficult to say whether such a transaction operated as a gift, a delivery, or a transfer. I am not, therefore, surprised to find—having regard to the object in view—that the language of the act is comprehensive enough to apply to such a transaction. The learned counsel said, that this was an order of a penal nature, and ought to be construed as strictly as a conviction. I was surprised to hear such a proposition, because there is a well known distinction between orders and convictions: and on reference to the authorities, I find they are abundantly sufficient to maintain the present order. In *Rex v. Middlehurst (a)*, an order against a person for aiding and assisting in fraudulently removing the goods of a tenant or concealing the same, was held good; and yet removing goods and concealing them are undoubtedly two distinct offences. In another case, *Rex v. Lloyd (b)*, articles were exhibited against a clerk of the peace, charging him with several offences which involved the forfeiture of a freehold office; and an order which adjudged him “guilty of several of the articles,” and removed him from the freehold office, was held good. The second objection, therefore, also fails, and there is, consequently, no ground for making this rule absolute and discharging the party out of custody.

MAULE, J., CRESSWELL, J., and WILLIAMS, J., concurred.

Rule discharged.

(a) 1 Burr. 399.

(b) 2 Stra. 996.

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WALKER v. FURNELL.

January 12.

[In the Exchequer of Pleas.

Coram *Pollock, C. B., Parke, B., Alderson, B., and
Platt, B.*]

A RULE had been obtained in Michaelmas Term last, calling upon the plaintiff to shew cause why he should not bring the postea into Court and carry in the roll, and why the defendant should not be at liberty to enter a suggestion thereon, to deprive the plaintiff of costs, under the 9 & 10 Vict. c. 95, s. 129.

A person who is not shewn to be connected with, or to have any means of knowledge concerning a cause, may make an affidavit for a rule to enter a suggestion to deprive the plaintiff of costs.

It appeared that the action was tried before the sheriff of Middlesex, when the plaintiff obtained a verdict for 4*l.* 16*s.*

Joyce now shewed cause. 'The affidavit upon which the rule was obtained is made by a stranger to the cause, who is merely described as a contractor's clerk, and it does not shew how he is connected with the action, or that he has any knowledge concerning it. The defendant or his attorney is the proper person to make an affidavit of this kind, for they are conversant with the case. Here the deponent does not even swear that he was present in Court during the hearing of the cause, or that he is acting for the attorney or his clerk during illness (*a*).

Barstow, in support of the rule. In order to set aside a judgment for irregularity, it is necessary that an affidavit should be made by some one who is connected with the cause, because it must be sworn that there are merits, and

(*a*) Another point was made which it is unnecessary to report, as the Court gave no decision upon it.

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no one unconnected with the cause can know them. But here, a stranger may know the facts necessary for a suggestion, which is traversable, and not final in the first instance. He may know whether the residence of the plaintiff is within the district of the County Court better than the defendant or his attorney. It might be more satisfactory if the affidavit had been made by a person connected and acquainted with the case, for it may be said that a stranger is ignorant of the merits; but it is not necessary that he should know anything of them, because the merits of the action do not come into question. The affidavit verifying a plea in abatement may be made by a third person; 1 *Tidd's Prac.* 640, 9th ed. So, formerly, an affidavit to hold to bail might be made by a stranger; *King v. Lord Turner* (a).

POLLOCK, C. B.—The affidavit upon which this rule was granted, does not shew, upon its face, that the deponent has any connection with the cause, or that he has any means of obtaining knowledge concerning it. The Master, however, informs us, that there is no rule to prevent such a person from making an affidavit like the present, and, in some cases, a perfect stranger can do so. And though there should, perhaps, be a rule of Court upon the subject, yet, as the practice stands, we cannot reject this affidavit. This rule must, therefore, be absolute.

PARKE, B.—I am of the same opinion. The question we have to consider is, whether we ought to make this rule absolute upon such an affidavit as the present? It is made by a person who is not shewn to have any connection with the cause, or to possess any means of obtaining knowledge concerning it; but the Master informs us, that there is no rule which excludes the affidavit of such a person; and,

(a) 1 Chit. Rep. 58; and *vide Brown v. Davis*, id. 161.

certainly, we ought not to make one in this case; although, perhaps, a general rule of Court ought to be made upon the subject.

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With regard to what has been said as to our decision not being final, because the plaintiff may traverse the suggestion, we ought to be careful how we put a party to the expense of a traverse, because there are no means by which he can, if successful, obtain his costs. Affidavits to verify pleas in abatement, and to hold to bail according to the old practice, are sufficient, if made by a third person. So in motions to change the venue, the affidavit may be made by the attorney, and need not be made by the defendant himself, as decided in *Shearburn v. Shubuck* (a). This being so, and there being no rule to the contrary, this rule must be absolute.

ALDERSON, B.—I also am of the same opinion. At present there is no rule that a person unconnected with the cause cannot make an affidavit on a motion of this sort. I do not see how we can alter it now, but I think there should be a rule of Court to do so. It seems to me that this affidavit is sufficient according to the present practice, and this rule must, therefore, be made absolute.

PLATT, B., concurred.

Rule absolute (b).

(a) 6 Scott, N. R. 833.

(b) Reported by Leofric Temple, Esq.

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January 31.

LLOYD v. MANSELL.

[*Bail Court. Coram Erle, J.*]

An agreement of reference of a cause, in which the costs of the cause, reference, and award were to abide the event, contained a clause authorizing either party to make it a rule of Court. The arbitrator found that the plaintiff was entitled to recover a less sum than 20*l*. Held, that it might be made a rule of Court without being first stamped.

W. L. THOMAS moved to make an agreement of reference a rule of Court.

The following facts appeared upon the affidavits. The parties, by a private agreement of reference, submitted "all matters in difference in the above cause" to the award of an arbitrator. The costs of the cause, reference, and award were to abide the event. The submission contained a clause empowering either party to make it a rule of Court. The arbitrator made an award that the plaintiff was entitled to recover a sum of 1*l*. 12*s*. 4*d*. The plaintiff obtained, on counsel's signature, a Judge's order, in the usual manner, to make the agreement of reference a rule of Court; but the officers at the Rule Office refused to draw up the rule, on the ground that the agreement of reference was not stamped. It did not appear what was the form of the action, or what amount was claimed, or how far the action had proceeded at the time it was referred.

W. L. Thomas. The officer was in error in refusing to draw up the rule of Court, because the agreement of reference was not stamped. It nowhere appears that the subject-matter of it was for a sum exceeding 20*l*.

ERLE, J.—I think the party is entitled to his rule. It does not appear affirmatively that the subject-matter of the agreement is of the value of 20*l*.

Rule absolute.



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KIDGELL v. MOOR.

February 11.

[In the Common Pleas.]

Coram *Maule, J., Cresswell, J., Williams, J., and Talfourd, J.*]

CASE. The declaration, after stating the plaintiff's seisin in fee of one-seventh part of a certain close and premises, situate, &c., as tenant in common with W. K., and five other persons, and the occupation of the said seventh part by one John Readings, as tenant thereof to the plaintiff, claimed for the plaintiff and his tenants, occupiers of the said seventh part, a right of way for horses and carriages, &c., from the said close, over a close of the defendant, to a certain highway. Averment, that the defendant wrongfully intending to injure the plaintiff in his said reversionary estate and interest in the said seventh part, &c., whilst the said seventh part was in the occupation of the said John Reading, as tenant, &c., and whilst he, the plaintiff, was interested in the said seventh part of the same as aforesaid, to wit, on, &c., wrongfully and unjustly locked, chained, shut, and fastened a certain gate, standing in and across the said way; and wrongfully and injuriously kept and continued the said gate so locked, chained, shut, and fastened, in and upon the said way, for a long space of time, to wit, from thence until the commencement of this suit, and thereby during all that time wrongfully and injuriously obstructed the said way; by means of which said premises the plaintiff had been and was greatly injured in his reversionary estate and interest of and in the said seventh part; and also, by

A declaration in case by a reversioner, after stating that he had a right of way, for the tenants of his close, over the close of the defendant, averred that the defendant wrongfully "locked, chained, shut and fastened" a gate across the way, "by means of which said premises" the plaintiff was injured.

Held, upon motion in arrest of judgment, that the declaration disclosed a good cause of action.

Held also, that the allegation that "by means of" the premises the plaintiff was injured, was a substantive allegation of fact, and not an inference of

law resulting from facts antecedently stated.

A matter of fact may be well stated by an averment commencing with the term "whereby" or "whereupon" (a).

(a) See *Pryce v. Belcher*, 4 D. & L. 238.

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means of the committing of the said grievances by the defendant as aforesaid, one John Glanvill Lamb, who, before the committing of the said grievances, had contracted with the said plaintiff for the purchase of the said reversionary estate and interest for a large sum of money, to wit, &c., and who would otherwise have completed the said purchase, and have paid to the plaintiff the said sum of money, was deterred and prevented from completing the said purchase, and from paying the said sum of money to the plaintiff, and from thence hitherto had wholly declined to complete the said purchase, or to pay the said sum of money, or any part thereof, to the plaintiff; and thereby the plaintiff had been, and still was, hindered and prevented from completing the sale of his said reversionary estate and interest to the said J. G. L., and from receiving the said sum of money, or any part thereof, from the said J. G. L., and had thereby not only lost and been deprived of the advantage and emoluments which he would have derived and acquired from the completion of the sale of his said reversionary estate and interest to the said J. G. L., but had been forced and obliged to pay, lay out, and expend, divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of 100*l.*, in and about the said contract for the sale of his said reversionary estate and interest, and expenses incidental thereto.

Plea, not guilty. Issue thereon.

Upon the trial, before *Rolfe*, B., at the Abingdon Summer Assizes, 1849, a verdict was found for the plaintiff. In Michaelmas Term, 1849, *Whately* obtained a rule nisi for arresting the judgment; against which,

Keating and *Selfe* now shewed cause, and contended that the facts stated in the declaration might possibly amount to an injury to the reversion, and that, if so, the declaration was good. *Jesser v. Gifford* (a); *Dobson v. Blackmore* (b)

(a) 4 Burr. 2141.

(b) 9 Q. B. 991.

Tucker v. Newman (a); *Shadwell v. Hutchinson* (b); *Daniel v. North* (c); *Young v. Spencer* (d); *Baxter v. Taylor* (e); *Hopwood v. Schofield* (f); *Jackson v. Peshed* (g); 1 *Wms. Saund.* 322 d, n. (5), 346 b, were cited.

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Whately and *Pigott*, in support of the rule, contended that the declaration disclosed no injury to the reversion; and that the allegation that Lamb had refused to perform his contract for the purchase of the reversion was not such a damage as entitled plaintiff to maintain an action. [*Maule, J.*—If the breach of that contract was the only damage alleged, the declaration would be bad, but there is also a general allegation of damage.] That is only stated as a consequence of the act antecedently complained of; and if the Court sees that that act is not an injury to the plaintiff, the allegation that thereby the plaintiff was injured will not make it so. The objection to the declaration is, that it sets forth, not a defective statement of a right of action, but a defective right of action; and, therefore, the defect is not cured after verdict. In addition to the cases above mentioned, *Davis v. Black* (h); *Holford v. Hankinson* (i), and *Bright v. Walker* (k), were referred to.

MAULE, J. (l)—In this case the declaration which is objected to, alleges that the defendant “locked, chained, shut up, and fastened” a gate, whereby the plaintiff was injured in his reversionary interest; and, I think that, after verdict, it discloses a cause of action, and that the judgment, therefore, cannot be arrested. It may be, that at the trial

(a) 11 A. & E. 40; S. C. 3 Per. & M. 11.
& D. 14.

(b) M. & M. 350, and a second case between the same parties, 2 B. & Ad. 97.

(c) 11 East, 372.

(d) 10 B. & C. 145; S. C. 5 M. & R. 47.

(e) 4 B. & Ad. 72; S. C. 1 Nev.

(f) 2 M. & Rob. 34.

(g) 1 M. & S. 233.

(h) 1 Q. B. 900.

(i) 5 Q. B. 584.

(k) 1 C., M. & R. 211; S. C.

4 Tyr. 502.

(l) *Wilde, C. J.*, was sitting at

Nisi Prius.

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there was not evidence of such an obstruction as could have been injurious to the reversion; but, if so, that was a ground for a new trial, and not for arresting the judgment. Here the only question is, whether by any possible means of locking the gate, reasonably to be inferred, the reversion might have been injured; and, it appears to me, that the gate might possibly have been so locked and fastened as to create as permanent an obstruction to the right of way as the erection of a wall. It is not necessary to say what might be the effect, if the obstruction had appeared to be the result of a contract between the defendant and the tenant in possession; it is sufficient to say, that it might possibly be as great as a stone wall built across the road,—which, it is admitted, would give the plaintiff a good right of action. The allegation, that “by means of the premises” the plaintiff hath been injured in his reversionary interest, is not to be taken as stating that the injury to the reversion follows, as a consequence of law, from what has been previously stated. Where, indeed, there is a statement that a person died seised of certain lands, leaving A. B. his heir at law, “whereby” the said A. B. became entitled to those lands, that is an allegation of a matter of law; but here, it is an allegation of a matter of fact, according to the principle well expressed by the Lord Chief Justice in *Brown v. Mallett* (a), in this Court, and also stated in earlier cases there referred to. When a matter of fact is introduced, it is well alleged, though preceded by the terms “whereby” or “whereupon;” and those words neither make the allegation a matter of law, nor make it a bad allegation of a matter of fact. The injury here, therefore, is well stated as a matter of fact, and I therefore think, on the whole, that the declaration is sufficient, and that the judgment cannot be arrested.

CRESSWELL, J.—I have had a good deal of doubt upon

(a) 5 C. B. 599, 614. The judgment of the Court was delivered by Maule, J., and not by the Lord Chief Justice.

this question in the course of the argument, but, upon the whole, I agree with my Brother *Maule*. The case of *Jackson v. Peshed* (a), decides that when the facts do not shew, per se, an injury to the reversion, and there is no averment that they did injure the reversion, the declaration is bad. But when facts are stated which may, or may not, amount to an injury to the reversion, and there is also an allegation that there is an injury to the reversion, and that allegation is proved, the case is different. Here certain facts are stated, and the declaration avers, that "by means of the premises," the plaintiff's reversion was injured. I quite agree that that is an allegation of fact; and we must now take it to have been proved, if it can possibly so operate. I certainly think, an obstruction to a right of way by a gate, might be so managed as to constitute an injury to the reversion. And, I therefore think, the declaration is a good one, and that we ought not to arrest the judgment.

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WILLIAMS, J.—I am of the same opinion. It was urged, that the declaration would have been supported by evidence of the gate having been fastened on one or two occasions, and that that would have been no injury to the reversion. If the facts did not amount to an injury to the reversion, the jury ought to have found for the defendant; but they have found for the plaintiff; and if a state of things can possibly exist in such a way as to constitute this obstruction an injury to the reversion, we must presume that they existed in this case. The point, therefore, is narrowed to the question, whether such a state of things can by possibility exist. I think it is possible; and that the declaration, therefore, discloses a good cause of action. Consequently the judgment cannot be arrested.

TALFOURD, J., had left the Court.

Rule discharged.

(a) 1 M. & S. 233.

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January 18, 23.
February 25,

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[In the Common Pleas.

Coram *Wilde, C. J., Maule, J., Cresswell, J.,
Williams, J.]*

The final order for protection under the 7 & 8 Vict. c. 96, is a protection only in respect of debts named in the insolvent debtor's schedule; therefore to a declaration in debt, a plea that after the accruing of the debt, the defendant petitioned the Insolvent Debtors' Court, and that thereupon a final order for protection was made; and that the debt was contracted before the filing of the petition; was, upon general demurrer, *held* bad, for not alleging that the debt was named in the schedule.

Semble, that in respect of debts named in the schedule, the final order operates not only as a protection to the person of the debtor from all process, but also as a bar to an action for such debts.

DEBT by drawer against acceptor of a bill of exchange dated the 20th of December, 1845, for 22*l.* 4*s.* 6*d.*, three months after date.

Plea. That after the accruing of the said several debts and causes of action, and before the commencement of this suit, to wit, on the 27th of December, 1845, a petition for the protection of the defendant from process was drawn and filed according to the form of the statute in such case made, provided, presented by the defendant to the Lord Chancellor in the District Court of Bankruptcy; and thereupon after the filing of the said petition, and before the commencement of this suit, to wit, on the 27th day of January, A. D. 1846, a final order for protection and distribution was made in the matter of the said bill of exchange by Charles Phillips, Esq., then being a commissioner of the Court of Bankruptcy, duly authorized in that behalf by the Lord Chancellor, to wit, then being one of the commissioners of the Court of Bankruptcy authorized to act in the Liverpool District, and that the said debt was contracted before the filing of the said petition in the said District Court of Bankruptcy. Verification.

Replication. That the said petition for the protection of the defendant from process was presented, and a final order therein also mentioned was made, after, and before, the passing of an act of Parliament, &c. (7 & 8 Vict. c. 96). Verification.

General demurrer and joinder.

H. Hill, in support of the demurrer. The question is, whether an order of protection, made after the passing of the 7 & 8 Vict. c. 96, operates merely as a protection to the insolvent debtor from personal process, or whether it may be pleaded in bar in an action of debt; and it is submitted, that upon the true construction of that statute, taken conjointly with the previous act of the 5 & 6 Vict. c. 116, the order is a bar to the action. The 74th section of the later statute enacts, that the two acts shall be read together; and it was clearly the object of the Legislature that they should together form one code. The 5 & 6 Vict. c. 116, s. 1, enacts, that all persons except traders, and all traders owing less than 300*l.*, on giving notice of their intention, may petition the Court of Bankruptcy for protection from process; and empowers that Court to make an interim order of protection both to his person and property. The same section requires a full and true schedule of the petitioner's debts to be annexed to his petition, and provisionally vests all the estate and effects of the petitioner in the official assignee, upon the presentation of the petition. The fourth section then provides, that the commissioner shall inquire into the truth of the allegations in the petition and schedule; and that if he finds them to be true, and that the debts were not contracted by fraud, or under other circumstances specified in the section, he shall make a final order, "which shall be for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects" in an official and a creditors' assignee. The 7th section provides for the vesting of the petitioner's present and future property in the assignees; the 9th empowers the assignees, under certain restrictions, to take any property which he may acquire after the final order; and the 10th, which this plea follows, enacts, "that if any suit or action is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action that such petition was duly presented, and a

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final order for protection and distribution made by a commissioner duly authorized." The only question is, whether the later act repeals this section. The 7 & 8 Vict. c. 96, provides, by sect. 4, that the property of the petitioner shall vest in assignees; and, by the 22nd section, enacts, "that the final order to be made under the provisions of the" 5 & 6 Vict. c. 116, "as amended by this act shall protect the person of the petitioner from being taken or detained under any process whatever," in respect of debts due at the time of filing the petition, to the creditors named in the schedule. It will be contended that this section has repealed the 10th section of the earlier act; but such, it is submitted, is not its operation. In the 5 & 6 Vict. c. 116, s. 4, the order, which the 10th section makes a bar to an action, is called "a final order" "for the protection of the person of the petitioner from all process, and for the vesting" his property in assignees. In the 22nd section of the 7 & 8 Vict. c. 96, it is said, that the order shall "protect the person of the petitioner." The language of the two acts is similar; and if the order under the first, though in terms protecting only the person and vesting the property of the debtor, was a bar to an action of this kind, an order in similar terms, and made, as the 22nd section directs, "under the provisions of the" earlier "act, as amended by this act," may well have the same operation, especially as the Legislature has directed that the two acts should be read together. The object of both statutes is, that a petitioner who complies with their provisions, shall be entitled to plead the order of protection under the 10th section in the same manner as a bankrupt may plead his certificate. The recent cases of *Platell v. Bevill* (a), and *Jacobs v. Hyde* (b), are conclusive upon the subject. The Court of Exchequer there decided that a plea, precisely similar to this one, was good: and although it will be said that *Toomer v. Gingell* (c) is an authority

(a) 6 D. & L. 2; S. C. 2 Exch. 2 Exch. 508.
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(c) 3 C. B. 322; S. C. 4 D.

(b) 6 D. & L. 8, n. (b); S. C. & L. 182.

the other way, it is to be observed that the Court rather intimated an opinion upon the construction of the act, in which counsel acquiesced without further argument, than gave an express decision upon the point. Besides, that case may be supported on another ground; for the plea was bad for not shewing that the petitioner's property had vested in his assignees.

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In point of form also this plea is sufficient. It has been held that the plea should either follow the precise words of the 10th section, or shew that the provisions of the 4th section have been complied with; *Nicholls v. Payne* (a); *Gillon v. Deare* (b); *Wright v. Hutchison* (c); *Laurie v. Bendall* (d). [*Miles v. Pope* (e), and *Nash v. Brown* (f), were also referred to.]

Cooling, contra. An order of protection made since the passing of the 7 & 8 Vict. c. 96, is no bar to an action, but merely protects the person; for, it is submitted, the 10th section of the 5 & 6 Vict. c. 116, has been repealed—either totally, or to such an extent as to make a plea merely following its terms bad—by the 22nd section of the later act. Before the passing of the 5 & 6 Vict. c. 116, the benefit of the acts for the relief of insolvent debtors was limited to prisoners in gaol; and the object of that act was to extend that benefit to persons not in custody, and who honestly gave up their property to their creditors. The act, therefore, provided that a person might petition the Court, although he was not in actual confinement; and required that his petition should be accompanied by a full and true schedule of his debts, together with the names of his creditors, and also of his property. The Commissioner was directed to inquire into the truth of the petition and schedule, and if it appeared that the debts were contracted

(a) 7 M. & Gr. 927; S. C. 2 D. & L. 629; 8 Scott, N. R. 732.

(b) 2 C. B. 309; S. C. 3 D. & L. 412.

(c) 4 C. B. 569.

(d) Q. B. Trin. Vac. 1848; 17 L. J., N. S., Q. B. 348.

(e) 5 C. B. 294.

(f) 6 C. B. 584; S. C. 6 D. & L. 329.

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without fraud, &c., he was empowered to make a final order. The requirement of a full and true schedule of all the insolvent's creditors, as a condition precedent to the validity of the final order, was a new provision. This order seems, from the 4th section, to have been intended to accomplish three purposes; First, to protect the person of the petitioner; Secondly, to vest his estate and effects in assignees; and, Thirdly, to provide for the distribution of such estate and effects among the creditors of the petitioner. The first object was effectuated by the 10th section, which points out how the order is to operate as a protection to the debtor, and in what manner he may avail himself of it. It makes the order a bar to any action for any debt due at the date of the petition; and it was reasonable that it should do so, for the debtor was, by the 7th and 9th sections, deprived of all future as well as present property, and incapacitated, therefore, from satisfying any judgment against him otherwise than by imprisonment, which it was one of the chief objects of the act to abolish. [*Maule, J.*—I do not understand the 10th section as giving the whole of the protection which the Legislature intended to give an insolvent, but only as pointing out one of the ways in which he might avail himself of the protection which had previously been given him by section 4.] The 4th section seems to have been considered insufficient per se, otherwise the 10th would not have been passed. [*Williams, J.*—If, as you contend, the debtor obtains no protection from the final order, except that which the 10th section gives him, it follows that, although he may plead the final order in bar to an action brought against him, he cannot reply it to a plea of set-off.] The act may be defective in that respect. It differed, however, from all preceding Insolvent Acts, by making the final order a bar, not merely to debts comprised in the schedule, but to all debts “contracted before the date of filing his petition” (a). [*Maule, J.*—The 12th section empowers a creditor to apply to the Court of Bankruptcy

(a) Sect. 10.

to rescind the order, which may be done if the Commissioner thinks that the debtor did not make a full disclosure of his property and debts.] Nevertheless, the order was *prima facie* evidence that he had done this, and was a bar to any action which might have been brought against him. The 7 & 8 Vict. c. 96, which was passed to amend the former act, made, like the earlier statute, the filing of a full and true schedule a condition precedent to the grant of an order of protection; and it further required an affidavit of the truth of the contents of the petition and schedule. The form of petition given in the schedule of the act (A. No. 1) concludes with this prayer: "Your petitioner, therefore, prays such relief in the premises as by the statutes now in force for the relief of insolvent debtors may be adjudged" by the Court; and the form of order given in the same schedule (A. No. 3) is styled, "a final order" "to protect the person of the" debtor "from being taken or detained under any process whatever in respect of the several debts," &c., "due" "at the time of filing his petition," "to the several persons named in his schedule as creditors." The final order under this act does not—as the final order under the former act did—vest the property of the debtor in the assignee. Nor does it make any provision for distribution. So that of the three purposes which the order under the 5 & 6 Vict. c. 116, had to fulfil, the first is the only one which the later act intended to effectuate, viz., the protection of the debtor's person. The 22nd section makes the final order a protection only to "the person of the petitioner from being taken or detained under any process whatever;" and a protection also (as in the earlier Insolvent Debtors' Acts) only "in respect of the several debts," &c., "due" "at the time of filing the petition from such petitioner to the several persons named in his schedule as creditors," &c. That the order was intended to protect the person alone, appears further from the 23rd section, which empowers the Commissioner to order the discharge of any petitioner who may be in custody at the time of presenting

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his petition for any debt, "in respect of which he is protected from process by his final order;" and from the 26th which enacts, that the protection shall extend to all process for any contempt of Court,—which is process against the person alone. Further, by the 7 & 8 Vict. c. 96, ss. 4 and 73, the only future property of the debtor which passes to his assignees, is "the future estate, right, title," &c., which he may acquire "before he shall have obtained such final order." The reason, therefore, for making the final order a bar to the debt, as well as a protection to the person, ceases. [*Wilde*, C. J.—The word "future" in the first act would be satisfied by the same construction which is put upon it in the second,—limiting the "futurity" to the time of the vesting order.] It will be contended that the "future" property mentioned in the 7th section means merely reversionary property: but such a construction would be tantamount to holding that "future" means "present;" for reversionary property is present property, although present only in interest, and not in possession. The object of the 9th section is not very obvious; but it seems intended merely to give the assignees the power of taking possession by force, if necessary, of the property which is vested in them in law by the 7th section [*Williams*, J.—The 7th section of the first act says "that from and after the passing of the final order," "the whole estate present and future of the petitioner" shall "become "vested" in the assignees; and the 9th, after enacting "that the said assignees shall be entitled to claim and demand from the said petitioner" "any estate and effects acquired by him at any time after" the order, declares that all such estate and effects "shall be absolutely vested" in the assignee. The latter section, therefore, assumes that the estate and effects mentioned in it did not vest before.] The section in question is open to another construction; it may give the assignees an interest in the produce of the insolvent's personal labour, which, under the Bankrupt and former Insolvent Acts, the assignees were not entitled to; *Croft*

v. *Poole* (a); and the very stringent nature of the act,—which does not even reserve to the debtor the tools of his trade,—may, perhaps, point to this as the true meaning of the section.

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It follows from this view of the acts, that the 22nd section of the 7 & 8 Vict. c. 96, is inconsistent with the 10th section of the 5 & 6 Vict. c. 116, and, consequently, repeals it. [*Maule, J.*—The language of the 22nd section undoubtedly restricts the protection to the person, and, taken per se, is clearly inconsistent with the 10th section; for it makes the final order no longer a bar, but merely a protection to the person. But if the object was simply, not that the nature of the protection which the final order gave should be changed, but that the protection should extend only to debts in the schedule, then the 22nd section may be consistent with the 10th, and the final order might be pleaded in bar to a debt in the schedule.] Even if that be the effect of those sections, this plea is bad; for it does not aver that the debt sued for was included in the schedule. It is submitted, however, that the 10th section is totally uprooted by the 22nd. The language of an act, though merely in the affirmative, repeals any earlier enactment with which it is inconsistent. Thus, the 13 Geo. 2, c. 28, s. 5, which exempted from impressment all harpooners and seamen employed in the Greenland fishery trade, was, in *Ex parte Caruthers* (b), held to have been repealed by the 26 Geo. 3, c. 41, s. 17, which, without expressly repealing it, enacted that all harpooners and seamen employed in the same trade, and whose names were inserted in a list to be delivered to the collector of Customs, should be exempt from impressment. “Statutes introductive of a new law penned in the affirmative, do always repeal former statutes concerning the same matter, as implying a negative;” per *Eyre, J.*, in *Harcourt v. Fox* (c). Thus, when the 22nd section enacts that the final order shall protect the person of the debtor

(a) 1 B. & Ad. 568.

(b) 9 East, 44.

(c) 1 Show. 506, 520.

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as against all creditors named in his schedule, it implies that the order shall not afford any other protection than a protection to the person; and that that protection also, shall not be given as against creditors not named in the schedule.

With respect to the cases cited as to the form of the order, it is not intended to impugn their authority; and they may be dismissed with the observation, that they are all decided under the 5 & 6 Vict. c. 116, and are, consequently, decisive upon the present question. And although it may be true that *Toomer v. Gingell* (a) may be supported upon the ground suggested, it must be observed, that that was the ground either of the argument or of the decision. The argument was the same as that which has been urged on the present occasion, and the Court intimated that the construction of the act now contended for was the right one. In the cases of *Platell v. Bevill* (b), and *Jacobs v. Hyde* (c), the point as to the debtor being protected only as against the creditors named in the schedule was not taken; and the Court, in giving judgment, expressed no opinion on it. Those cases, therefore, are by no means conclusive authorities in support of this plea.

H. Hill, in reply. The property which passes to assignees, under the conjoint operation of the two acts, is the same as that which passed under the first act. Although the 4th section of the 5 & 6 Vict. c. 116, says that the order should be "for the vesting of" the debtor's "estate and effects," the property did not actually vest under the 4th section, but under the 7th section, which enacted, that the property should vest "without any deed or conveyance." The last words supply the key to the meaning of the words "future;" shewing that only such future property passes to the assignees as could by law pass by deed. The w

(a) 3 C. B. 322; S. C. 4 D. 508.
& L. 182.

(c) 6 D. & L. 8, n. (b); 1

(b) 6 D. & L. 2; S. C. 2 Exch. 2 Exch. 508.

immediately following throw further light upon the meaning of the term: "which assignees shall hold the same as fully as if the petitioner had been made a bankrupt and they had been assignees under his fiat." The object was to assimilate the position of an insolvent to that of a bankrupt; and the object and meaning both of the 7th section of the earlier act, and of the 4th and 73rd of the subsequent one, were the same, viz., that any future property which was of a nature capable of vesting at the time of the final order, should vest in the assignees. [*Cresswell*, J.—You say that there are some species of future property which do not vest in the assignees, because they cannot be assigned by deed or conveyance; but Parliament has, before this, directed that some kinds of property should vest which were not capable of assignment at common law.] The object of the 9th section is to provide the means of getting at such species of future property. If the 7th had included all future property whatsoever, the 9th would have been needless; but by restricting the operation of the 7th section, in the way now suggested, to such property as can pass by deed, the 9th section, which enables the assignees to reach—although it does not vest in them—the subsequently acquired property of the debtor, becomes intelligible. The second act merely altered the machinery for carrying into effect the objects of the first; but this alteration rendered a definition of the word "property" necessary, in order that not only the property which the debtor had at the time of the appointment of the assignee, but also that which he acquires between that event and the final order, might vest in the assignee, in the same way as it did under the 7th section of the earlier statute.

It is said, that the 10th section of that act alone gave the debtor a discharge as respected his property; but the cases of *Gillon v. Deare* (a), and *Wright v. Hutchison* (b), shew that

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(a) 2 C. B. 309; S. C. 3 D. & L. 412.

(b) 4 C. B. 569.

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this Court thought that a plea framed upon the 4th section would have been good. [*Wilde*, C. J.—All that it was necessary for us to decide in *Wright v. Hutchison* (a) was that as the plea did not pursue the 10th section, neither did it pursue the 4th.] At all events, it does not follow that because the final order under the second act is, in terms, only a protection to the person, it is not also a bar to an action; the final order under the first act was equally limited in its terms, and yet it was, beyond dispute, a bar. It is said that the first act made the final order effectual against all creditors, while the second confined its operation to those creditors only who were named in the schedule but that distinction is apparent only, not real. The second act is so framed that a creditor may reply to a plea setting up a final order, that his name is not in the schedule; while the former required him to take certain steps to get rid of the order pleaded in bar to his debt. The object to be effectuated is the same in both cases, and the distinction is merely a difference in the machinery for effectuating it. With respect to the objection to the plea on the ground that it omits an averment that the plaintiff's debt was included in the schedule, it is submitted that such averment is unnecessary; for the plea is framed upon the 10th section, and that section does not make such averment necessary.

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the Court.—This demurrer was argued before us with much ingenuity during the last Term. In support of the demurrer it was contended, that although the alleged order for protection and distribution mentioned in the plea was made after the passing of the 7 & 8 Vict. c. 96, that plea is still a good and sufficient plea in bar by virtue of the 10th section of the former act, the 5 & 6 Vict. c. 116.

(a) 4 C. B. 569.

By the 1st section of that act, certain persons were enabled to present a petition to the Court of Bankruptcy for protection from process, and the Court or any commissioner to whom any such petition was referred might give an interim order for protection against all process whatever, either against the person or property of the petitioner. By section 4, the commissioner was authorized, on being satisfied of certain matters, to grant an order, "which order shall be called a *final order*, and shall be for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in an official assignee, to be named by such commissioner, together with an assignee to be chosen by the" "creditors," as therein mentioned. By section 5, the commissioner was empowered to renew the interim order "from time to time until the final order for *protection and distribution*." This plainly refers to the final order mentioned in the preceding section, and, therefore, gives to the order for protecting the person of the petitioner, and for vesting his estate in assignees, the designation of an "order for protection and distribution." Section 7 provided, that from and after the passing of the final order, all the present and future estate of the petitioner should become absolutely vested in the assignees, and the 9th section gave the assignees a right to demand of the petitioner all property acquired by him after the final order; and enacted, that upon certain steps being taken, it should become absolutely vested in the assignees. This section gave rise to some discussion as to the meaning of the word *future* in section 7, but it is not necessary to deal with it in deciding this case. Then came section 10, by which it was enacted, "that if any suit or action is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized," "shall be sufficient evidence."

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The plea in the present case is framed in accordance with that section. It alleges, that after the accruing of the debts in the introductory part of the plea mentioned, a petition for the protection of the defendant from process was duly presented, and a final order for protection and distribution made, and that the said debts were contracted before the filing of the petition. If that section remains unaltered by any subsequent enactment, we think that the plea in this form must be held to be a good plea in bar; and so it was considered by counsel on the argument of the case, which turned upon the effect to be given to the subsequent statute of the 7 & 8 Vict. c. 96, the 1st section of which recites, that it is expedient to amend the 5 & 6 Vict. c. 116; but the 74th section enacts, "that nothing herein contained shall be construed to repeal, affect, or in any manner alter the provisions of the said recited act, except so far as herein above expressly provided, or except so far as the provisions of the said recited act may be inconsistent with or at variance with, the provisions of this act." Now, the 10th section of the former act is not expressly repealed; and the question is, whether it is "inconsistent with, or at variance with," the provisions of this latter act. In order to determine this, we must inquire what was the nature of the order made under the former statute, and which the 10th section allowed to be pleaded in bar. By the 4th section it appears that it was "a final order" "for the protection" "of the petitioner from *all process*," "and for the vesting of his estate" in assignees; which "final" order is, by the 5th section, named an "order for protection and distribution." This order is, by the 10th section, allowed to be pleaded in bar in actions brought "for or in respect of any debt contracted before the date of filing his petition." The 4th section is not expressly repealed by the subsequent act, but is inconsistent with the 22nd section of it, whereby it was enacted, "that the final order to be made under the provisions of the said act as amended by this act shall protect the person of the petitioner from being taken or

detained under any process whatever in the cases hereinafter mentioned; (that is to say,) from all process in respect of the several debts and sums of money due or claimed to be due at the time of filing the petition from such petitioner to the several persons named in his schedule as creditors, or as," &c., limiting its operation to persons and claims named in the schedule. This is inconsistent with the 4th section of the former act, which applied generally to all debts contracted before the filing of the petition; and, therefore, so far repeals it. Upon the same principle, it appears to us, that if the 10th section of the former act is to be imported into the 7 & 8 Vict. c. 96, it must be with the qualification that the final order shall only be a bar to actions brought in respect of debts or claims mentioned in the schedule; for to allow it as a bar in other cases would be inconsistent with the latter act. This was not much disputed at the Bar, but it was contended that the plea might still be pleaded in the form before given, and that if the debt was not in the schedule, that should be replied; and the case of *Platel v. Bevill* (a), was cited as an authority to that effect. And so it is; but the question principally considered in that case was, whether a final order obtained under the 7 & 8 Vict. c. 96, constitutes an absolute bar to an action for the debts as to which it is a protection, or operates only as a protection to the person of the insolvent. The Court of Exchequer decided that it is an absolute bar; and after hearing a very able argument on that question, we are disposed to agree with that opinion; but we abstain from binding ourselves by a decision on the point, inasmuch as it appears to us, that assuming the final order to be an absolute bar in all cases where it is a protection at all, still the plea is bad. In *Platel v. Bevill*, the attention of the Court does not appear to have been drawn to the limited operation of the final order made under the

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(a) 2 Exch. 508, 511.

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7 & 8 Vict. c. 96, viz., that it applies only to debts in the schedule, and not to all debts contracted before the filing of the petition. In framing a plea in bar under the 10th section of the 5 & 6 Vict. c. 116, it was necessary to show that the debt sued for accrued before the filing of the petition, to shew that it was a matter upon which the order might operate, although the general form of the plea sanctioned by the 10th section made it unnecessary to set out the proceedings before the commissioner; it being the intention of the Legislature that matters decided by the commissioner should not be again disputed, as was said by Tindal, C. J., in *Cook v. Henson* (a). Upon the same principle, we think, that in order to make a plea in bar under the 10th section of the 5 & 6 Vict. c. 116, consistent with regard to the 7 & 8 Vict. c. 96, it should allege only that the debt accrued before the filing of the petition, but that it was named in the schedule.

For want of such an averment it appears to us that the plea is bad, and that our judgment must be for the plaintiff; but considering the doubtful nature of the question thus argued, we think it right to give the defendant leave to amend his plea on the usual terms.

Leave to amend, otherwise judgment for the Plaintiff.

(a) 1 C. B. 908.



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DAWSON and Another v. SMITH.

January 31.

[In the Common Pleas.

Coram *Wilde, C. J., Maule, J., Cresswell, J., and Williams, J.*]

THIS was a rule, calling upon the plaintiffs to shew cause why the trial of the cause and the verdict should not be set aside for irregularity, and a new trial had; and why the *postea* should not, in the meanwhile, remain in the hands of the associate, and the entry of final judgment on the trial be stayed.

The following facts appeared from the affidavits in support of, and in opposition to the rule. The action was brought by the drawers against the acceptor of a bill of exchange, and, issues in fact having been joined, notice of trial was given for the adjourned sittings in London after Trinity Term, 1849. On the 15th of June, the defendant obtained a rule for a special jury, which, however, he did not serve; but the cause was, by consent, made a remanet to the sittings after Michaelmas Term. On the 5th of December, the defendant's attorney applied to the Marshal to mark the cause as a special jury cause; but this was refused, on the ground of the distant date of the rule. On the same day a copy of the rule was served upon the plaintiffs' attorney, with a notice that an appointment to nominate the jury would be served on the following day. The notice of the appointment was served accordingly, and was attended on the 7th, when the jury were nominated, and the attorneys of both parties signed a memorandum at the foot of the list of the forty-eight names selected, stating that they had agreed to that list.

After the cause had been set down for trial, the defendant obtained a special jury rule. The plaintiff attended at the nomination of the jury, but on the same day obtained an order from the Judge *nisi prius*, that the cause should be tried in its order by a common jury, unless a special one was first struck. The cause was tried accordingly, no special jury having been struck.

Held, that the cause had been properly tried; as a special jury rule does not deprive a party of his right to the common jury process, until a special jury has been struck; and that the plaintiff's attendance at the

nomination—a proceeding which he could not prevent—had not made the special jury rule binding on him.

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On the same occasion, however, the plaintiffs' attorney informed the attorney for the defendant, that he intended serving the latter on the same day with a summons to shew cause why the special jury rule should not be discharged. The defendant's attorney obtained an appointment for Saturday the 8th, to strike the jury, and was in attendance on the morning of that day to do so. The plaintiffs' attorney, however, objected to the list being then reduced, on the ground that he had not had sufficient notice for that purpose; and as the appointment was not peremptory, the Master's clerk declined proceeding to reduce the list (a). The defendant then obtained and served a peremptory appointment for that purpose, for Monday, the 10th, at 11 A. M. The cause stood in the paper for trial on the 8th. Meanwhile the plaintiffs had, on the 7th, obtained and served a peremptory summons, returnable on the following morning before the Lord Chief Justice at the Guildhall, to discharge the special jury rule, and to try the action in its order by a common jury. The defendant did not attend to shew cause; and, on the 8th, the Lord Chief Justice made an order that the cause should be tried by a common jury in the order in which it stood in the paper, unless a special jury were struck before it came on; and directed, at the same time, that a notice should be served upon the defendant or his attorney, that the cause would be so tried unless good cause were shewn to the contrary. That notice was served at 6 P. M. on the same day; the cause was called on in its order before ten o'clock on the following Monday morning; and, the defendant not appearing, the jury found a verdict for the plaintiff for 43*l*.

Channell, Serjt., shewed cause. The plaintiffs' proceedings have been perfectly regular throughout. They were not bound to submit to the postponement of the trial of their cause until it suited the defendant's convenience to strike a special jury. It is a common practice in the

(a) The defendant's affidavits part of the case, but the Court gave a different account of this adopted the one given in the text.

Queen's Bench and Exchequer to make orders for the trial of causes, under similar circumstances, by common juries.

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Byles, Serjt., and *Pigott*, in support of the rule. It is conceded that the defendant was irregular in not taking the special jury rule, which he had obtained on the 15th of June, to the Marshal, until the 5th of December. That irregularity, however, was waived by the plaintiffs on the 7th of December, when their attorney signed the memorandum assenting to the list of the forty-eight jurymen nominated on that day; and therefore, even if the special jury rule were bad, the assent of both parties has made it binding on them. [*Maule*, J.—They agree that the forty-eight names shall compose the list out of which the jury shall be reduced, if the person who obtained the rule shall put himself in a proper condition to try the cause by a special jury.] Before the plaintiffs obtained the summons on the 7th of December, to set aside the special jury rule, they had recognised the validity of that rule. [*Wilde*, C. J.—The plaintiffs did not consent to any step which they could prevent the defendant from taking. They attended to strike the special jury; but that was merely to take care that the defendant should strike fairly. They could not prevent the defendant from striking it.] The 6 Geo. 4, c. 50, s. 30, empowers the Courts to order a special jury to be struck for the trial of any cause, and then declares, that “every jury so struck shall be the jury returned for the trial” of the issue. Here the Court had made an order for the striking of such jury; the only jury, therefore, which could try the cause was the jury which should be struck in pursuance of that order; and to hold that the Judge could nevertheless properly order the cause to be tried by a common jury, would be tantamount to repealing a legislative enactment.

WILDE, C. J.—It is erroneous to suppose that in setting aside the rule for a special jury, the Court deprives the defendant of anything which the statute has given him.

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The Court does not interfere with the privilege which the jury act has conferred upon him, but it will not suffer the rule of Court to be abused. The rule is, in truth, a nullity; if the party obtaining it does not give effect to it by having a jury ready when the cause is called on to be tried. The defendant in this case obtained a special jury rule; but he did not put the cause in a condition to be tried by a special jury, by getting it marked accordingly by the Marshal, and it therefore stood before the Judge as a common jury cause. The defendant then served the special jury rule; whereupon the plaintiffs took out a summons to set it aside—why the summons was taken out in that form I do not know—and obtained an order that the cause should be tried in the order in which it stood; leaving the defendant to use the intervening time, as best he might, to procure the attendance of a special jury. The defendant then served a rule for striking the special jury; the plaintiffs could not prevent him from proceeding to do so, but they served the defendant with a notice that they would claim to have the cause tried in its order. An appointment was then taken out to reduce the list; that appointment they were not bound to attend; and though they did attend it, they did so only for the purpose of protesting against the proceeding, and renewed their intimation that they would have the cause tried in its order. It is in due course called on in its order, and tried; and the defendant now says, that because the plaintiffs attended on the 7th, and watched the nomination of the jury—which they could not prevent—they must be taken to have consented to the cause being tried by a special jury. I think there is no ground for any such inference; and that, as it did not appear that the special jury was obtained for any other purpose than delay, I think the application of the plaintiffs was properly granted.

MAULE, J.—The defendant appears to have had for his object delay, and nothing but delay. When the case was tried, it stood in its regular order as a common jury cause and was regularly tried. The act of Parliament enacts, i

e, that the special jury, when struck, shall be the jury the cause ;—and no doubt what the defendant wanted that the jury should have been struck on the 8th, re in that case he would have attained his object, viz., —but no such jury was struck, and therefore the act ot apply.

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SWELL, J.—I am of the same opinion. It has been, that when a rule for a special jury has been ob- the Court cannot discharge it, but that the real ing of the act is, that the cause must be tried by a jury. That, I think, is an erroneous view of the . 4, c. 50. That act provides that the Court may a special jury to be struck, and that the jury so struck e the jury to try the cause. It does not say that the shall be delayed until the jury shall have been struck, t the plaintiffs shall be deprived of the privilege of ; the common jury process; but only, that if either take steps to get a special jury, and that special jury ually struck, the cause must be tried by that jury. til the jury has been struck, the sheriff has no power panel any other than a common jury. The case, ore, stands thus: the rule for a special jury is good; has not been effectually acted upon, and is now, for the cause has been tried. No effectual step en taken to delay the trial of the cause, and the as perfectly regular. With respect to any supposed duct on the part of the plaintiffs in misleading the lant by asking for a second appointment for reducing ry, it turns out that the defendant's affidavit gave an ous account of that part of the case (*a*). It appears otice was distinctly given, at that very time, that the iffs claimed the privilege of not consenting to anything ich they were not bound to consent.

LLIAMS, J., concurred.

Rule discharged.

(*a*) See *ante*, p. 152, n. (*a*).

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May 26, 1848.
February 25,
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PHILLIPS v. LEWIS.

[In the Common Pleas.

Coram *Wilde, C. J., Coltman, J., Maule, J., and
Cresswell, J.*]

The Court
will not alter
a writ of sum-
mons from
"promises" to
"debt," to
avoid the
operation of
the Statute of
Limitations.

LUSH, in Easter Term, 1848, obtained a rule, calling upon the defendant to shew cause why the writ of summons and the copy thereof, served upon the defendant, should not be amended by substituting the words "of debt," in the place of the words "on promises."

From the affidavits in support of the rule, the following facts appeared. On the 27th of October, 1845, a writ of summons in debt was issued by the present plaintiff against David Lewis for 398*l.* 16*s.* 6*d.*, due for principal and interest upon a promissory note made by David Lewis for 302*l.* 9*s.* 7*d.* dated the 2nd of March, 1839, and payable to the plaintiff or order on the 12th of June 1840. David Lewis died on the 24th of September, 1846, while a demurrer to the plaintiff's replication was pending, and appointed the present defendant his executor, who proved the will on the 16th of April, 1847. On the 31st of May following, the plaintiff issued against him, as such executor, the present writ, upon promises, for the same cause of action (*a*). The plaintiff, in February, 1848, applied to *Williams, J.*, at Chambers, for leave to amend the writ in this action in the mode now proposed. The learned Judge, however, refused the application, but stayed further proceedings until the fifth day of the following Term, in order to give the plaintiff an opportunity of renewing it before the Court.

Hugh Hill shewed cause (*b*). There are conflicting decisions upon the subject of amending writs to avoid the operation

(*a*) The first action was brought second in the Common Pleas.
in the Court of Exchequer, the (*b*) In Trinity Term, 1848.

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of the Statute of Limitations, but it is submitted, that the Courts have no authority to do so. The Court of Exchequer have, it is true, allowed writs to be amended, on the ground that the Statute of Limitations would be a bar to a fresh action; *Eccles v. Cole* (a); *Lakin v. Watson* (b); *Brown v. Fullerton* (c); but the Court of Queen's Bench, in *Roberts v. Bate* (d), and this Court, in *Campbell v. Smart* (e), refused to allow writs to be amended on that ground. At all events, the copy of the writ cannot be amended; *Byfield v. Street* (f); *Eccles v. Cole*. [*Partridge v. Wellbank* (g), was also referred to.]

Lush, in support of the rule. The amendment sought to be made in *Campbell v. Smart*, was the substitution of a false, in lieu of the true date of the original and alias writs, in order that a pluries writ might appear to have been issued in time; and the Court rightly held, that it had no power to suffer a false date to be recorded for the purpose of defeating a defence which the law gave. Here, however, the amendment asked for is according to the truth. The Court of Queen's Bench, it is admitted, did, in *Roberts v. Bate*, disclaim the power of amending which had been exercised by the Exchequer; but in *Mavor v. Spalding* (h), the late Mr. Justice *Williams*, following the case of *Williams v. Williams* (i), allowed the plaintiff to indorse upon the alias and pluries writs the date of the return of the first writ, for the purpose of saving the Statute of Limitations; and *Cole-ridge, J.*, in *Rennie v. Bruce* (k), expressed an opinion favourable to the exercise by the Courts of the power of amendment. In *Culverwell v. Nugee* (l), the Court of

(a) 1 Dowl. 34, N. S.; S. C. 8 M. & W. 537.

(b) 2 Dowl. 633; S. C. 2 C. & M. 685; 4 Tyr. 839.

(c) 2 D. & L. 251; S. C. 13 M. & W. 556.

(d) 6 A. & E. 778.

(e) 5 C. B. 196.

(f) 10 Bing. 27; S. C. 3 M. & Scott, 407.

(g) 5 Dowl. 93; S. C. 1 M. & W. 316.

(h) 1 D. & L. 878.

(i) 10 M. & W. 476; S. C. 2 Dowl. 509, N. S. In *Medlicott v. Hunter*, however, (February 8, 1850, see *post*.) the Court of Exchequer refused to amend the indorsement upon a pluries writ to avoid the operation of the Statute of Limitations.

(k) 2 D. & L. 946.

(l) 15 M. & W. 559; S. C. 4 D. & L. 30.

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Exchequer allowed an amendment similar to that made in *Williams v. Williams* (a), and in *Mavor v. Spalding* (b).

Cur. adv. vult.

MAULE, J., now delivered the judgment of the Court.—This case was mentioned at the end of last Term as one in which we had not given judgment; but we understood that the rule had been discharged, or had been dropped. It was a motion to alter a writ in order to avoid—I had almost said, to evade—the effect of the Statute of Limitations. The view which the Court take of the question is this: if there be a sufficient reason for making an amendment, the fact that the Statute of Limitations will be available if the amendment be not made, is no reason for refusing to make it; but if there be no other reason for making it than that the statute will be a bar, that is not a ground upon which such an application will be granted. The Statute of Limitations does not, it appears to us, alter the right or affect the justice of the grounds for making or refusing an amendment, which should be made or refused without any reference whatever to the statute. That, I believe, was the ground on which the Court understood the rule in this case had been discharged; but it is so long ago since the question was before them, that they will not now detail their reasons more fully. The object of the rule was to amend a writ by changing the form of action from promises to debt, so as to make it conformable to an action against the defendant's testator, which had abated by the death of the latter, in order to save the Statute of Limitations; and, for the reasons I have mentioned, we think the amendment ought not to be allowed.

Rule discharged (c).

(a) 10 M. & W. 476; S. C. 2 Dowl. 509, N. S.

(b) 1 D. & L. 878.

(c) See all the cases collected in *Broom's Practice*, 653—9; and

see also the cases as to amendments generally since the Uniformity of Process Act, collected in a note to the case of *Wood v. Hume*, 4 D. & L. 139, n. (a).

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BARNEWALL, P. O. *v.* SUTHERLAND and Others.

January 29
February 25.

[In the Common Pleas.

Coram *Wilde, C. J., Maule, J., Cresswell, J., and Williams, J.*]

THIS action was commenced by the Commercial Bank of London, in the name of Taylor, one of their public registered officers. The issue—which contained, amongst other pleas, a traverse that Taylor was public officer,—was delivered, and notice of trial given, on the 9th of July, 1849. Taylor died on the 18th of that month; Barnewall was soon after appointed public officer in his place, and the following suggestion was thereupon entered upon the nisi prius record immediately after the jurata clause:—

After the issue was delivered in an action by a joint stock company in the name of their public officer, the latter died, and another officer was appointed in his place; upon which the plaintiff entered, immediately after the jurata clause, a suggestion upon the nisi prius record in the following form:—“Before which last mentioned day, &c, the said J. T. died, and T. B. was appointed public officer in his place. Thereupon the suit so

“Before which last mentioned day, and after the said 10th of July, to wit, on the 18th of July 1849, the said John Taylor departed this life, being, until and at the time of his death, such registered public officer as aforesaid. Whereupon, according to the first mentioned act of Parliament, as the same has been extended by act of Parliament secondly above mentioned, as in the declaration in this cause mentioned, one Thomas Barnewall, then being, and henceforth hitherto and still being one of the registered public officers of the said Commercial Bank of London, was

commenced by J. T. is further continued by T. B. Therefore, &c.” The cause was entered on the commission day with the Marshal, in the name of the new officer, and upon the same day the defendants’ attorney was served with a notice of the death of the old, and the appointment of the new officer, and of the entry of the suggestion: but the latter was not served or filed. The cause was tried in the name of the new officer,—some of the defendants appearing and protesting, others not appearing,—and the company obtained a verdict.

Held, that as the suggestion was entered without the authority of the Court, and without any opportunity being given to the defendants to traverse the facts stated, and as it did not state any matter excluding the defendants’ right to do so—such as follows a suggestion which the opposite party is not allowed to traverse,—it was entered irregularly, and did not authorize the trial of the cause in the name of the new public officer.

Seemle, that the suggestion ought to have been entered on the plea roll.

Whether such suggestion, if properly entered, is traversable, *quære?*

If traversable, whether the time between the 10th of August and the 24th of October, is to be excluded from the defendants’ time to plead, *quære?*

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and is duly appointed in the room and place of the said J. T., deceased, further to continue and prosecute the said action. And thereupon, and thereby and according to law in that behalf, the said suit, so commenced by the said J. T. as aforesaid, is further continued, prosecuted, and carried on by the said T. B., for and on behalf of the said copartnership. Therefore, &c.

The jury process was tested on the last day of Trinity Term. The commission day for Surrey, (where the venue was laid), was the 6th of August ; and the cause was entered with the Marshal on that day, under the title of “ Barnewall, P. O. v. Sutherland.” Late on the evening of the same day, the company served, at the office of the defendants’ attorney, a notice of the death of Taylor, of the entry of the suggestion, and of their intention to continue the action in the name of Barnewall, and to take it down to trial accordingly ; but they did not serve or file the suggestion. When the cause came on to be tried before *Pollock*, C. B., on the 18th of August, the defendants’ counsel objected, before the jury were sworn, to the trial being proceeded with, on the grounds that the action had abated by the death of Taylor, that the defendants had no opportunity of traversing the suggestion, and that as the jury process was tested on the last day of the preceding Term, on which day Taylor was alive, the jury must be taken to have been summoned in the cause of “ Taylor v. Sutherland,” and not in that of “ Barnewall v. Sutherland,” which, therefore, they had no authority to try. The learned Judge overruled the objections ; the cause was tried, the defendants appearing under protest ; and the company obtained a verdict, leave being reserved to the defendants to move for a new trial.

Russell Gurney having, in the Michaelmas Term following, obtained a rule accordingly,

Channell, Serjt., and *Peacock*, now shewed cause. The cause was regularly tried. As Taylor died after issue

joined, an entry of a suggestion of his death, and of Barnewall's appointment as his successor, upon the judgment roll, would have been sufficient; and it was not necessary that any such suggestion should be entered upon the nisi prius record; *Tidd's Prac.* 1119, 1120, 9th ed., citing *Denn v. Farr* (a), and *Farr v. Denn* (b). But if such an entry was necessary, the suggestion entered was sufficient, and the proceedings were, in every respect, regular. It is said, on the other side, that the defendants had not eight days to plead to the suggestion before the cause came on for trial. It is submitted, however, that the 2 Wm. 4, c. 39, s. 11, which prohibits the filing or delivery of any declaration, "or pleading after declaration," between the 10th of August and the 24th of October, applies only to pleadings before issue joined. To extend its operation to subsequent pleadings would be productive of much hardship: it would, for example, prevent a party from pleading *puis darrein continuance*. If the construction of the statute contended for by the plaintiff be correct, the defendants had more than eight days to plead to the suggestion before the cause was tried. [*Maule, J.*—This suggestion does not purport to be the allegation of the plaintiff, or of any body else, and seems pleaded in a form to exclude a traverse.] It could not well have been pleaded otherwise. [*Maule, J.*—Does not the usual form commence thus: "the plaintiff gives the Court here to understand and be informed, that," &c.?] It is submitted, however, that whatever might be the form of a suggestion of this nature, it would not be traversable. In *Watson v. Quilter* (c), suggestions were classified into traversable and non-traversable; and the present one, it is submitted, is of the latter description. If a plaintiff changes his name, or is created a baronet before judgment, and that fact is suggested on the nisi prius record, or on the roll, surely such a suggestion is not traversable. This case is

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(a) *Barnes*, 469.

(b) 1 *Burr.* 363.

(c) 1 D. & L. 244; S. C. 11
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precisely similar; the plaintiff is not changed, for it is *the* company that is the plaintiff, and not the public officer, who is called in the act, and is in truth, only the nominal plaintiff. The Banking Act, (7 Geo. 4, c. 46, s. 9,) enacts, that all actions and suits which may be instituted on behalf of a joint stock company, shall and may be instituted in the name of any one of the public officers; "and the death, resignation, removal, or any act of such public officer, shall not abate or prejudice any such action, suit," &c., "commenced against, or by or on behalf of such copartnership, but the same may be continued, prosecuted, and carried on in the name of any other of the public officers of such copartnership for the time being." The act, it will be observed, does not require that the death, resignation, or removal of a public officer, or the appointment of his successor, shall be suggested; and it would seem, therefore, that all that the company was bound to do, was to give the defendants notice that the cause would be proceeded with in the name of the new public officer. [*Maule, J.*—The 9th section says two things: first, that the death of the public officer shall not abate or prejudice the action; and, secondly, that the same may be continued in the name of another officer. Does not that mean, that when, after the death of the public officer, you arrive at that stage of the cause in which it is necessary to mention the name of the plaintiff, you may introduce the name of the new officer: and then you must state why you name him and not the former officer? There may not be any necessity before the trial for doing this; but when the nisi prius record is returned, and judgment is obtained, the new name must be used, and that probably would be the time for entering the suggestion on the roll.] Precisely so: the suggestion, therefore, was altogether superfluous, and the case may stand as if none had ever been entered. [*Cresswell, J.*—Then the nisi prius record would shew that Taylor was plaintiff; but Barnewall was the plaintiff in the cause which was tried by the Chief Baron.] The defendants had

notice that the cause would be tried in the latter name. But, at all events, there was no change in the real plaintiff. [*Webb v. Taylor* (a) was referred to.]

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Russell Gurney and *Ogle*, in support of the rule. If no suggestion was necessary, as is contended on the other side, the cause ought to have been tried in the name of "*Taylor v. Sutherland*." There did not exist any such cause as that tried under the title of "*Barnewall v. Sutherland*." The defendants were not parties to, nor were the jurors or witnesses summoned in, any such cause. The jurors could not have been fined for failing to attend when it was called on, for they were not summoned in that cause; and they had, therefore, no jurisdiction to find a verdict in it. The witnesses could not have been indicted for perjury, for their evidence was not given in any existing cause; and if one of the defendants had suffered judgment to go by default, and execution were now to be sued out against him in the cause of *Barnewall v. Sutherland*, he might lawfully resist the sheriff's officers. The verdict, therefore, under such circumstances cannot stand, even if the plaintiff's proposition, that no suggestion was necessary, were well founded. But it is submitted that a suggestion was necessary, and that the defendants ought to have had an opportunity of traversing it. But for the Banking Act, all the members of the copartnership must have been named as plaintiffs. That act provided, that actions might be brought and defended in the name of the public officer of the company, and that when judgment was recovered against him, execution might issue against any member of the company. It is, therefore, highly important that the defendant in an action, brought in the name of a public officer, should have the opportunity of putting the plaintiff to the proof of his title as public officer; for otherwise the defendant might not have the means of knowing whether he might have

(a) 1 D. & L. 676.

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execution against any member of the company, or only against the plaintiff on the record. In this case the defendants traversed the allegation that Taylor was the public officer; and if it had not been proved at the trial that he was, the action must have failed. Taylor dying, it became equally important that the defendants should know that Barnewall was the public officer. [*Cresswell, J.*—The argument is applicable in the case of the original plaintiff, because by traversing that he was the public officer, the defendants deny that the action was brought by the company. But if that was proved at the trial, could the company afterwards escape from the result of the action by denying that the second was their officer?] Suppose the defendants had taken down the cause to trial by proviso, might they not have been told, when it was called on, that Taylor was dead, and that no public officer had been appointed in his stead? Besides, the defendants ought to be at liberty to require proof of the death of the public officer. It may be that Taylor was not dead, but that after the action was commenced in his name, the company found that his evidence was material, and, in order that he might be called as a witness upon the trial, withdrew his name from the record,—which they are not authorized to do. In *Pennoir v. Brace* (a), it was held that, where one of four defendants died after error brought upon judgment against them in the Common Bench, the plaintiff could not sue out execution without suggesting the death upon the record. [*Williams, J.*—Because the writ of execution would not agree with the judgment; the latter being against four, and the former against three, defendants.] The act says that the death of the public officer shall not abate or prejudice the action, but that the same may be continued in the name of another officer. The 8 & 9 Wm. 3, c. 11, s. 7, contains a similar provision;—enacting that an action shall not be abated by the death of one or more of

(a) 1 Salk. 319; S. C. 1 Ld. Raym. 244.

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several plaintiffs or defendants, but that such death being suggested upon the record the action shall proceed:—and it was held in *R. v. Cohen* (a), that a trial of a cause, in which a coplaintiff had died after issue joined, and in which no suggestion of the death was entered on the record, was extra-judicial, and, consequently, that no perjury could be assigned upon any false evidence given at such trial. [*Maule, J.*—The act of Wm. 3 says, that “such death being suggested upon the record, the action shall proceed;”—making the entry of a suggestion a condition precedent to the further prosecution of the cause; and that seems to have been the hinge upon which the judgment of Lord *Ellenborough* in *R. v. Cohen* turned.] The same construction must be given to the Banking Act, viz., that the action shall not abate if it be continued in the name of another public officer. But how can it be continued except by a suggestion upon the record? [*Maule, J.*—In 1 *Chit. Stat.* 2, n.(e), a form of suggestion is given, which, it is said, “may be entered on the nisi prius record immediately after the jurata.” His Lordship read that form.] In *Brocas v. Civit.’ London* (b), it was laid down as the regular practice of the Court, “that when either party will suggest any special matter about awarding the venire out of the common course, a copy must be given to the opposite party, and they must have a reasonable time to consider it, before you enter a nient dedire.” The words “therefore, &c.” at the end of this suggestion are evidently the first words of a new venire, which, being awarded out of the common course, ought, under the authority of the last cited case, to have been served upon the defendants, who should have had an opportunity of traversing it. When it was contended, in the course of the argument in *Plomer v. Ross* (c), that a suggestion of breaches upon the roll, under the statute of 8 & 9 Wm. 3, c. 11, s. 8, could not be pleaded to by the defendant, *Chambre, J.*, observed: “He may plead to a suggestion! Common jus-

(a) 1 Stark. N. P. 511.

(b) 1 Stra. 235.

(c) 5 Taunt. 386, 391; S. C.
1 Marsh. 95.

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tice requires it." So, it is laid down: "wherever a person not a party to the record is to be affected by the judgment, or wherever the judgment upon the record is to be such as would not be ordinarily warranted by the previous proceedings on the record, there must be a suggestion made, by leave of the Court, in the proper form, so as to afford an opportunity to the party to be affected by it to demur, if he thinks the facts suggested are insufficient in point of law, or to plead, if he means to deny them;" *Bartlett v. Pentland* (a). And although that case has since been overruled, in so far as it decided, that in an action against a company constituted like the present one, execution could not be sued out against a member of the company, until it was suggested upon the roll that he filled that character (b), yet the passage from the judgment just cited, which explains the object of entering a suggestion, has never been impugned. *Far v. Denn* (c), differs altogether from the present case; for there the death of the deceased defendant was suggested upon the roll, and a stay of proceedings against that defendant, and a new venire to try the issue against the surviving defendant, were awarded. All the cases bearing upon this subject were reviewed in *Watson v. Quilter* (d); and the general doctrine seems to be, that where the subject-matter of the suggestion comes within the exclusive cognizance of the Court,—as, for example, where a venue is to be changed because an impartial trial cannot be had, or where the sheriff is a party,—the suggestion is not traversable, because the entry of it is the act of the Court after a preliminary inquiry into the expediency of making it; but that in all other cases, suggestions of matters of fact are traversable and triable by a jury, according to the general principle of law, which refers the decision of all matters of fact to that tribunal. [*Williams, J.*—What, do you say, ought the company to have done?] They might have

(a) 1 B. & Ad. 704. 711, 2.

(c) 1 Burr. 363.

(b) See *Bosanquet v. Ransford*,
11 A. & E. 520; S. C. in Cam.
Scac. 2 Q. B. 972.

(d) 1 D. & L. 244; S. C. 11
M. & W. 760.

served the defendants with the suggestion in time to enable them to plead to it, and demanded their plea. [*Williams, J.*—Suppose the death had happened the day before the assizes.] Then the company, it must be admitted, would have been thrown over the assizes. And there would be no peculiar hardship in this. But for the Banking Act the company would have been in the situation of ordinary plaintiffs, and the action would have abated altogether; they have, therefore, no right to complain if the Legislature, in conferring upon them the privilege of continuing the action in the name of a new officer, did not also provide against the possibility of some delay arising in the process of making that privilege available. [*Harwood v. Law (a)*, was also cited.]

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CRESSWELL, J., now delivered the judgment of the Court.—In this case a rule had been obtained, on the part of the defendants, to shew cause why the verdict which has been found for the plaintiff should not be set aside, and a new trial had.

The facts were, that the plaintiff, who sued as public officer of a banking company under the statute, died after issue joined; that the nisi prius record was made up from the plea roll as though the party were alive; that the venire had been awarded accordingly as between Taylor, as plaintiff, and the defendants; and that no entry was made upon the plea roll of the death, or of the appointment of the new public officer. It appears further, that after the nisi prius record was passed, so made up, a memorandum was entered upon it stating the fact of the death, and that Barnewall had been appointed public officer, but which was not stated by way of suggestion to the Court, nor followed by any statement of a confession by the defendants or a “nient dedire;” and that after such entry had been

(a) 7 M. & W. 203.

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made, the cause was entered for trial as a cause of “*Barnewall v. Sutherland*,” and was tried by the jury returned upon the venire in a cause at the suit of Taylor. Upon the part of the plaintiff notice had been given of the death of Taylor, and that such an entry would be made, and that the cause would be tried. Some of the defendants appeared to protest against the trial, and others did not appear. A verdict was found for the plaintiff; and the present rule was afterwards obtained to set aside that verdict, upon the ground that the entry made upon the record of the death of Taylor, and that Barnewall had been appointed public officer, was irregular; and also that the proceeding to trial in a cause in which “*Barnewall*” was the plaintiff, by a jury returned under a venire in a cause in which “*Taylor*” was the plaintiff, was irregular.

Upon shewing cause against this rule, the plaintiff insisted that his proceedings had been regular, being authorized by the statute of 7 Geo. 4, c. 46. By the 9th section of that statute, the companies mentioned therein are authorized to sue in the name of a public officer; and it is enacted, that “the death, resignation, or removal, or any act of such public officer, shall not abate or prejudice any such action,” &c., “but the same may be continued, prosecuted, and carried on in the name of any other public officers of such copartnership for the time being.” And in sect. 12 it is enacted, that any judgment recovered against any public officer of the copartnership shall have the like effect and operation against the property of the partnership, and the property of every member thereof, as if such judgment had been recovered or obtained against the copartnership. The plaintiff contends that, under these words, no suggestion to the Court or entry upon the plea roll was necessary; and that a mere memorandum upon the nisi prius record, stating the fact of the death of Taylor, and that Barnewall had been appointed public officer, was all that was required; and also that the cause was properly tried in the name of such new public officer as plaintiff, and that no new venire was requisite.

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Upon the part of the defendants it was contended, that the enactment that the action should not abate by the death of the public officer, the plaintiff, (as would have been the case by the course of the common law,) and that the action may be carried on in the name of the new public officer, does not dispense with the necessity of the fact of the death and the appointment of the new public officer being suggested upon the record, nor with the issue of a venire in the name of the new or substituted plaintiff. And the defendants insisted that, except where there is an express statutable provision dispensing with it, in all cases where there is a change of parties during the progress of the cause before trial, that change is required to appear upon the record by way of suggestion to the Court; and that where such facts are not traversable, they should be followed by a confession or "nient dedire."

In this case the defendants had traversed by plea the appointment of Taylor as a public officer of the company, and a verdict for the defendants upon the issue on that plea would have been a full defence. And for a good reason; for the company would not be bound by the judgment in the cause unless the plaintiff Taylor was a public officer of the company, nor would the property of the members of the company have been bound by any such judgment. And the fact whether Barnewall was a public officer of the company when he was substituted as plaintiff, is as important to the defendants, as was the character of Taylor when he stood upon the record as plaintiff; and if the Court, upon application, would have allowed a suggestion that Barnewall was a public officer to have been entered with a confession or a "nient dedire," some satisfactory evidence must have been offered to the Court of the fact. But in this case the memorandum was entered upon the record, stating the fact, without any authority from the Court, and in a very informal manner, without any opportunity to the defendants to traverse the facts stated, or any matter excluding the right to do so, such as follows a suggestion which the

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opposite party is not allowed to traverse. Without entering into the question whether, if the suggestion were properly entered upon the plea roll, the facts alleged would be traversable or not, it is clear that the entry which was made on the nisi prius record in this cause was irregular, and did not authorize the trial of the cause in the name of Barnewall as the substituted plaintiff, and therefore the rule for setting aside the verdict, and for a new trial, must be made absolute—

Rule absolute.

January 31.

EVANS v. SENIOR.

[In the Exchequer of Pleas.

Coram Pollock, C. B., Parke, B., Alderson, B., and
Platt, B.]

A defendant taking out a summons for time to plead, is entitled to the whole of the day on which such summons is dismissed, for the purpose of pleading, although the regular time had expired before such dismissal.

IT appeared from the affidavits in this case, that the declaration had been filed on the 17th of January, with a notice of eight days to plead, which expired on the 25th. On the 24th, the defendant took out and served a summons for a month's time to plead, which was returnable at three o'clock on the 25th. The plaintiff did not attend, and on that day a second summons for a month's time to plead was taken out and served, returnable at three o'clock on the 26th. On this summons the plaintiff attended, and Rolfe, B., refused to make an order, on the ground that the defendant would not consent to change the venue. The plaintiff then, on the 26th, signed interlocutory judgment, which was set aside as irregular, with costs, by an order of Rolfe, B., on the 30th.

Keane now moved, on behalf of the plaintiff, for a rule to set aside the order of Rolfe, B., and all proceedings of

the defendant subsequent thereto. The time for pleading expired on the 25th, and, in the regular course, judgment could have been signed on the 26th. If a summons for further time to plead, returnable on the day on which judgment can regularly be signed, is to deprive a plaintiff of his right, a defendant can always obtain one, and sometimes two days for pleading more than he is entitled to, even when a Judge would dismiss the summons. In the present case the summons was dismissed; and it would be hard that the plaintiff should be delayed by a summons which a Judge thinks right to dismiss, even though he did not attend on the 25th. If the plaintiff had attended the first summons, it would have been dealt with in the same manner, and he could have signed judgment on the 26th in the regular course. In *Hughes v. Walden* (a), the Court said, that a defendant was not entitled to the same time for the purpose of taking the next step as he had when he obtained the rule. But they thought he should have a reasonable time allowed him for the purpose of taking the next proceeding, and they thought the whole of the day on which the rule is disposed of, such a reasonable time. But that was a rule nisi, and had been granted by the authority of a Judge. Here the summons is the mere act of a Judge's clerk, and is obtained as a matter of course. [*Parke, B.*—The summons is always supposed to be granted under the direction of the Judge himself, though his clerk acts.]

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PARKE, B.—We ought to be bound by the last case, and we abide by the rule laid down in *Mengens v. Perry* (b), which is a reasonable one. This rule will, therefore, be refused.

ALDERSON, B.—The rule is laid down with clearness in *Mengens v. Perry*. There a defendant took out a summons for particulars, which was dismissed after the expiration of

(a) 5 B. & C. 770, n. (b).

(b) 15 M. & W. 537.

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the time given for pleading; and the Court held that he was entitled to the remainder of the same day for pleading. That is a reasonable rule, and applies here; and why should it be changed? The defendant's first summons was returnable on the 25th, before the plaintiff could have signed judgment. Then why did not he attend it, and get it dismissed as he might have done? It was owing to his default that the defendant was compelled to obtain a second summons on the 26th; and he ought to be in the same situation on that day as he would have been on the 25th, if the plaintiff had attended.

POLLOCK, C. B., and PLATT, B., concurred.

Rule refused (*a*).

(*a*) Reported by Leofric Temple, Esq.



January 17. In the matter of a Complaint in the Whitechapel County Court of Middlesex,
Between JOHN BADDELEY, Clerk, &c., Plaintiff,
and
BENJAMIN DENTON, Defendant.

[In the Exchequer of Pleas.

Coram Rolfe, B., sitting alone.]

The 12 & 13
Vict. c. 109,
s. 44, requires
the name and
address of any
person party
to any action,
suit, or pro-

ceeding, now pending on the common law side of the Court of Chancery, or their attorney, to be entered in a certain book kept in the Petty Bag Office. This act repealed 11 & 12 Vict. c. 94, the 39th section of which was similar to the 44th section of the 12 & 13 Vict. c. 109. *Held*, that a compliance with the provision of the repealed act was a compliance with the new statute, and that a second entry of the name and address was not necessary.

the plaintiff obtained a rule, calling on the defendant to shew cause why the writ of prohibition should not be quashed, or set aside with costs. Upon cause being shewn against this rule, it was objected that the affidavit of the plaintiff, upon which the rule nisi had been granted, did not shew that the plaintiff, or his attorney, had complied with the 44th section of 12 & 13 Vict. c. 109, by entering his name or address in the book mentioned in that section. This objection, however, was overruled, and the rule was made absolute on the 24th of November. On the 26th of the same month the defendant obtained a rule, calling on the plaintiff to shew cause why the rule for setting aside the prohibition, should not be set aside for irregularity, and for a stay of proceedings in the mean time. The alleged irregularity was the omission by the plaintiff or his attorney, to comply with the 44th section of the 12 & 13 Vict. c. 109, (intituled "An Act to amend an Act to regulate certain offices in the Petty Bag in the High Court of Chancery, the practice of the Common Law side of that Court, and the Enrolment Office of the said Court,)" which enacts, "That every person, party to any action, suit, or proceeding now pending in the said Court of Chancery on the common law side thereof, shall, before taking any fresh step in or about any such action, suit, or proceeding, cause to be entered in a book to be kept in the said Petty Bag Office, if he intends to act in person, and not by attorney therein, his own name and address, and if he intends to act by attorney and not in person, then the name and address of his attorney." This act repealed the 11 & 12 Vict. c. 94, the 39th section of which was similar to the 44th section of the 12 & 13 Vict. c. 109. The last mentioned statute received the royal assent upon the very day on which the plaintiff entered his name in the book as required by both the acts. At the time he did so he did not know of the passing of the new act; and when

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that statute came to his knowledge, he applied to enter his name under its direction, but was told that his name was already in the book, and could not be entered again.

Manesty now shewed cause. The question is, whether a compliance with the first act is not a compliance with the last, or whether the name and address of the party or his attorney must be entered again under the new statute. The name in the present case was entered under the 39th section of the 11 & 12 Vict. c. 94. The plaintiff swears that he did on his own behalf, and also on behalf of Thomas Baddeley and Henry Baddeley his copartners in business, on the 1st of August, A.D. 1849, personally, and with his own hand, enter his own Christian and surname and address, and the respective Christian and surnames and addresses of the said Thomas Baddeley and Henry Baddeley (plaintiffs and copartners in business) in a book, then, and as plaintiff believes still kept in the Petty Bag Office; and that the said book was produced to plaintiff, by the clerk in the said Petty Bag Office, as the proper book in which to enter the names, &c. At the time of making such entry the plaintiff swears he was not aware of the passing of the 12 & 13 Vict. c. 109; but he entered his name on the very day it received the royal assent, so that there is a compliance with the act. So that even if the entry is not sufficient under one act, it is under the other. If the repealed act was complied with, the Court will not say that it is necessary to enter his name again, because it would be a mere idle ceremony to do that which is already done. Besides, there is a proviso in sect. 1 of the last act, "that the repeal of the said act shall not "invalidate" any "act, matter, or thing already made or done;" but all such "acts, matters and things shall be as good, valid, and effectual, to all intents and purposes, as if the said act had not been repealed." So that any thing required or done under the first act will stand good under

the second. [He then contended, that if there were any irregularity it was waived by delay, and that if there was not any irregularity the rule must be dismissed, because it merely sought to set aside the former rule on that ground.]

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Townsend, in support of the rule. This rule must be made absolute, if the words of the statute are to be construed as imperative. The words of the 12 & 13 Vict. c. 109, s. 44, are, "before taking any fresh step." A fresh step has here been taken, but no entry has been made to satisfy the act; and the words of the act have not been complied with. Though they are affirmative words, they must be construed as imperative. "Negative words will make a statute imperative; and, it is apprehended, affirmative *may*, if they are absolute, explicit, and peremptory, and shew that no discretion is intended to be given; and especially so, where jurisdiction is conferred;" *Dwarris on Statutes* (a). The plaintiff must perform the conditions prescribed before he can take advantage of the change of jurisdiction from the Chancery to the common law Courts. He has not complied with those conditions; for it is sworn that, on the 24th of November, search was made in the book kept for the purpose of entering the names and addresses as required by the act; and that at no "time since a certain act of Parliament, passed in the twelfth and thirteenth years of the reign of her present Majesty Queen Victoria, intituled 'An Act,' &c., came into force and operation," has any entry as required been made. The simple question is, are the words of the act imperative? It is submitted that they are, and that, therefore, this rule must be absolute.

ROLFE, B.—It is quite clear to me that there has been a

(a) Page 611, 2nd ed.

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compliance with the words of the act of Parliament, taking them imperatively,—the object of the act being, that there should be a book kept containing the names and residences of persons or their attorneys who have any proceedings on the common law side of the Court of Chancery, in analogy to what is done in the common law Courts. Both the acts say that, before “taking any fresh step,” certain entries shall be made in the book kept for the purpose. The plaintiff entered his name on the very day that the latter act received the royal assent, say, if you will, before that assent was obtained. The words of the act have been complied with: those words are, “cause to be entered.” He has done so, and the name still continues to be entered; for he applied after the passing of the act, and he was told that his name was already entered in the book. It would be a strange construction of the act, to compel the plaintiff to go through the ceremony of tracing the signature and address, already in the book, with a dry pen. The rule will, therefore, be discharged.

Rule discharged (*a*).

(*a*) Reported by Leofric Temple, Esq.



MILLER and Another v. DE BURGH.

January 12, 26.

[In the Exchequer of Pleas.

Coram Pollock, C. B., Parke, B., Alderson, B., and
Platt, B.]

THIS action was brought to recover the sum of 1689*l.* 18*s.* 2*d.*, the amount of two bills of costs incurred by the defendant and others, the managing committee of the Northern and Southern connecting Railway Company, in defending two suits in Chancery brought against the members of the managing committee. The cause came on for trial at the Spring Assizes for Surrey, held at Kingston, 1849, when a verdict was, with the consent of the parties, entered for the plaintiffs, with 3000*l.* damages, costs 40*s.*, and 1*s.* damages on the judgment on a demurrer in the cause, subject to the award of an arbitrator, who was empowered to direct that a verdict should be entered for the plaintiffs or the defendant, as he should think proper; and to whom "the cause, and also the subject-matter of the cause, and the rights of the parties in relation thereto, as well at law as in equity, were thereby referred, to order and determine what he should think fit to be done by either of them respecting the matters in dispute." It was also ordered, that the costs of the cause should abide the event of the award, and that the costs of the reference and award should be in the discretion of the arbitrator, who might direct and award to and by whom, and in what manner, the same should be paid. Either of the parties were to be at liberty to make the order a rule of Court, and in the event of either of them disputing the validity of the award, them, the defendant should pay to the plaintiffs those two sums. *Held* a good sufficiently certain and final.

A cause was referred by order of nisi prius, to the award of an arbitrator, to whom "the cause, and also the subject-matter of the cause, and the rights of the parties in relation thereto, as well at law as in equity, were referred, to order and determine what he should think fit to be done by either of them respecting the matters in dispute." The arbitrator found by his award, that under a certain agreement entered into by the parties, the plaintiffs were entitled to receive two sums of money from the defendant; and directed that upon proof that certain payments had been made by award, as being

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the Court was to have power to remit the matters referred to the reconsideration and determination of the said arbitrator.

The arbitrator made his award, and directed that the verdict for the plaintiffs should stand; but ordered also, "that the said entry of damages of 3000*l.* be reduced to the sum of 1*s.*, besides the said damages of 1*s.* entered on the judgment on demurrer; and I do further award and adjudge that under and by virtue of an agreement, duly made between the said plaintiffs with the said defendant and others, being members of a certain company, called the Northern and Southern connecting Railway Company, whereof the said plaintiffs were solicitors and agents, on or about the 29th day of November, in the year of our Lord, 1847, the said plaintiffs will be entitled to receive from the said defendant, instead of any damages in the said cause, other than the two sums of 1*s.* each above mentioned, two several sums of money, (that is to say), the sum of 375*l.*, and the further sum of 400*l.*, (such 400*l.* being the balance of a certain sum of 1200*l.*, then agreed to be paid to the said plaintiffs, and whereof they have already received 800*l.*), so soon as they, the said plaintiffs, shall have fully satisfied and discharged the lawful claims and demands of the several persons, who, before the making of the said agreement, had been employed and acted as the local agents and solicitors of and for the said company, and which said claims and demands the said plaintiffs then undertook to satisfy and discharge. And I do further award and direct, that upon the production by the said plaintiffs to the said defendant of the proper vouchers and receipts of the said several persons who were so employed and acted as aforesaid, and upon proof that the said lawful claims and demands have been fully satisfied and discharged, according to the said undertaking and agreement of the said plaintiffs in that behalf, the said defendant do pay to the said plaintiffs the said two several sums of 375*l.* and 400*l.*, and that upon payment thereof, the said plaintiffs do give to the said defendant a full acquittance and discharge

of and from all claims and demands whatsoever, for or in respect of the several matters in dispute referred by the said recited order." The plaintiffs were further ordered to pay the defendant his costs of, and incidental to, the award, and to bear their own costs.

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A rule having been obtained in Michaelmas Term last, calling on the defendant to shew cause why the award should not be set aside, in whole or in part,

Channell, Serjt., and *Bovill*, shewed cause. This award is good. There is a perfect finding on all that is referred. The arbitrator finds that there was an agreement between the parties for paying the plaintiffs, which he orders to be carried into effect. He adds, it is true, a condition precedent to their being paid, viz.: that they shall produce certain vouchers to the defendant. But that condition is but reasonable, and cannot invalidate the award. If the award is uncertain, it is so, at all events, in an immaterial part, and the portion objected to may be treated as surplusage, being merely directory. In *Russell on Awards* (a), it is said, "Though the award do not fix the amount, yet if it refer to any instrument, by reference to which the sum may be readily computed, it is good enough. Thus, where the arbitrators directed the defendant to pay to the plaintiff's attorney a certain amount, stated to be the amount of his bill delivered, which bill included charges for professional services for another as well as for the plaintiff, the award was considered by *Parke*, B., as sufficiently certain, although the amount of the plaintiff's share of that bill was unascertained by the award, since, as the sum awarded was stated to be for a bill already delivered, the sum due from the plaintiff to his attorney might easily be ascertained by reference to the bill." And the case of *Thorp v. Cole* (b), is cited as an authority. The Court will uphold the award if they

(a) Page 283.

(b) 2 C., M. & R. 367; S. C. 4 Dowl. 457.

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possibly can. [On this point he referred to *Cargey v. Aitcheson* (a); *Plummer v. Lee* (b); *Wohlenberg v. Lageman* (c).] Then, as to its being final. The arbitrator directs, that when the plaintiffs produce vouchers they are to be paid by the defendant. That direction is sufficiently final when the condition has been complied with. It may be said, that the award is not certain, as it does not specify, "upon proof" to whom, "the said lawful claims," &c., "have been discharged." But it does so sufficiently, because it directs the production of the vouchers to be made to the defendant.

Greenwood, (*Joyce* with him), in support of the rule. This award directs the plaintiffs to shew the defendant that they have satisfied the local agents. This direction of the arbitrator is open to objection, and is uncertain. He disposes of the action so that the plaintiffs are shut out from their remedy at law, and then he says, that until the plaintiffs do certain things, they shall have no rights in equity. [*Alderson*, B.—The arbitrator disposes of all disputes at law and equity; he says the plaintiffs are to do certain things, and then to receive certain money. That is final. Would it have been a bad decree, if a Court of equity had decided as the arbitrator has done?] The arbitrator might decide what the equities were, and how they were to be enforced. But this award settles nothing, for the plaintiffs cannot enforce their equitable rights, and it is, therefore, not final. [*Parke*, B.—In *Price v. Popkin* (d), an award was held to be uncertain, in not specifying the value, quality, or description of certain fixtures to be set up by the lessee. His Lordship also referred to the case of *Angus v. Redford* (e).]

Cur. adv. vult.

(a) 2 B. & C. 170; S. C. 3 D. 579.
& R. 433.

(d) 10 A. & E. 139; S. C. 2 P.

(b) 2 M. & W. 495; S. C. 5 & D. 304.
Dowl. 755.

(e) 11 M. & W. 69; S. C. 2

(c) 6 Taunt. 254; S. C. 1 Marsh, Dowl. 735, N. S.

POLLOCK, C. B., delivered the judgment of the Court. —This was a rule to set aside an award, or a part of it; but we think the award is good, and that, therefore, the rule must be discharged. The reference was in substance upon a legal claim for damages; but the arbitrator had power to investigate equitable claims also, and to direct what should be done by the parties. In respect of the legal claim, the arbitrator awarded 1s. damages; but he has also further awarded that the plaintiffs should be entitled to the performance by the defendant of a certain agreement, upon proof that certain persons, to whom payments were to be made, had been paid.

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We think the award may be supported on one or other of these two grounds, if not on both, viz., that the arbitrator has in the previous part of his award completely decided the legal and equitable questions, and that the direction objected to is merely an imperfect direction, which may be treated as surplusage, not being authorized by the order of reference; or that it is merely a direction following the terms of the agreement, which the arbitrator has found had been made between the parties, and which he directs should in its terms be carried out. Either, then, because the part objected to is surplusage, or because it is the very matter agreed to be done between the parties, we think the arbitrator right in his award and direction. This rule to set it aside must be discharged.

Rule discharged (*a*).

(*a*) Reported by Leofric Temple, Esq.



January 12.

MACGREGOR v. KEILEY.

[In the Exchequer of Pleas.

*Coram Pollock, C. B., Parke, B., Alderson, B., and
Platt, B.]*

Where the affairs of a railway company have been referred to a Master in Chancery under 11 & 12 Vict. c. 45, this Court will stay proceedings in an action against one of the provisional committee for a debt of the company even after judgment, the plaintiff being bound under that act to prove his debt before the Master.

THIS was an action for professional services rendered by the plaintiff as solicitor to the Midland Grand Junction Railway Company, of which the defendant was a provisional committeeman. Upon the trial, the plaintiff obtained a verdict for 320*l.*, for which sum, besides costs, judgment was entered up. The defendant was afterwards arrested for the costs, but discharged under a Judge's order. A rule nisi to rescind that order was, however, obtained in Michaelmas Term last, and enlarged to the present Term. A petition having been presented to the Lord Chancellor to wind up the affairs of the company, an order was made on the 3rd of November, 1849, to refer them to one of the Masters in Chancery, to be wound up, under the 11 & 12 Vict. c. 45.

Corrie now—upon an affidavit of the defendant stating the above facts—moved for a rule, calling on the plaintiff to shew cause why all further proceedings in this action should not be stayed until the plaintiff proved his debt before the Master in Chancery, pursuant to the 11 & 12 Vict. c. 45, s. 73. The company's affairs are now before the Master in Chancery to be wound up, and the proceedings ought therefore to be stayed. Upon reading the interpretation clause, there can be no doubt that the defendant is a "contributor" to, and the plaintiff a "creditor" of the railway company, within the meaning of the act. Sect. 3, which is the interpretation clause, enacts, that "the word 'contributory' shall include every member of a company,

and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof, whether as heir," &c., "or as a former member of the same, or as heir," &c. And "the word 'creditor' shall include every person having any debt or demand enforceable against any company in any Court of law or equity, or for non payment or non satisfaction of which damages could be recovered." The 73rd section enacts, "that after the first appointment of an official manager no creditor or other person shall, except so far as the Master shall permit, have power to commence or to *proceed with* any action against the official manager or against the company, or any other person representing the same, or who is sued as a contributory thereof, until after proof, or exhibiting or making such proof as he may be able, of his debt or demand before the Master, as hereinafter mentioned; and it shall be lawful for any Judge of the Court in which such action shall be pending, upon summons taken out before him for that purpose, to order that all further proceedings in such action shall be stayed until after such proof shall have been made or exhibited before the Master." It is true that there is no list of contributors yet made out by the official manager and the Master, as is required by the act (*a*), because the proceedings have not arrived at that stage; but the Court will nevertheless stay the proceedings, it being quite clear that the plaintiff is a "creditor," and the defendant "a contributor," within the meaning of the act. It is also beyond doubt that the debt is the debt of the company; for it is an action to recover for services done in and about the affairs of the company. [*Alderson*, B.—The defendant is sued on his own personal responsibility. The services may have been done for the Midland Grand Junction Railway Company on the credit of the provisional committeeman. Then the question is, is it the debt of the company? You must shew that.] It appears by the

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(*a*) Sects. 76, 77.

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affidavit to be the debt of the company, and that is not contradicted. In *Thompson v. The Universal Salvage Company* (a), it was held, that where the affairs of the company are being wound up under the 11 & 12 Vict. c. 45, the creditor must, in the first instance, prove his debt before the Master. *Parke, B.*, there says, "The 11 & 12 Vict. c. 45" provides for the affairs of an insolvent company "being administered under the direction of a Master in Chancery, who has power to enforce payment from each individual liable to contribute, and thus provide a fund for the liquidation of the partnership debts. That being so, we must see what construction is to be put on the 73rd section of that act; and the effect of it is, that all persons in the situation of creditors are, in the first instance, to prove their debts, and, having done so, they are entitled to be paid. That mode of obtaining satisfaction for their debts is substituted by the 11 & 12 Vict. c. 45 for the remedy given by the former act (b); but if it should turn out to be abortive, this Court will, in its discretion, allow an unpaid creditor to issue execution against the persons liable to contribute. In the mean time, by the true construction of the 11 & 12 Vict., so long as there is a reasonable prospect of obtaining payment by proving the debt under the provisions of that act, it is our duty to prevent individual creditors from having execution against the shareholders of the company. We ought, therefore, to stay proceedings where any execution has actually issued, and consequently we should now prevent this execution from issuing."

Willes shewed cause in the first instance. First, this debt cannot be the debt of the company, because it is established to be the debt of the defendant. The company never obtained its act; and the defendant is within the ruling of the case of *Walstab v. Spottiswoode* (c). Secondly, The

(a) 3 Exch. 310, 318; S. C.
6 D. & L. 465.

(b) 7 & 8 Vict. c. 110.
(c) 15 M. & W. 501.

73rd section of the act does not apply to cases where judgment has been actually obtained, for the plaintiff cannot prove his judgment as against the company; and even if he can prove the debt, he cannot come upon the company for the costs of the cause. Unless it be quite clear to the Court that the proceedings ought to be stayed, this rule will be discharged, especially as it would deprive the plaintiff of a right which he possesses by virtue of his judgment.

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Corrie was heard in reply.

POLLOCK, C. B.—I think that this rule ought to be made absolute. The affidavit discloses quite sufficient to shew us that this is the debt of the company, and that is not denied by the other side. These proceedings must, therefore, be stayed until the plaintiff has proved or attempted to prove his debt before the Master.

PARKE, B.—I am of the same opinion. I think this case is within the meaning of the act of Parliament, provided the debt be one for which the company is liable, and not the defendant individually. It is sworn that it is the debt of the company, and that is not denied. There is abundant proof on the affidavit to satisfy the Court. The 73rd section applies here, on the authority of the case of *Thompson v. The Universal Salvage Company* which I think was properly decided. The rule will, therefore, be absolute for a stay of proceedings until the plaintiff has proved his debt before the Master.

ALDERSON, B., and PLATT, B., concurred.

Rule absolute (a).

(a) Reported by Leofric Temple, Esq.

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January 14.

LARKIN v. MARSHALL et Ux.

[In the Exchequer of Pleas.

Coram Parke, B., Alderson, B., and Platt, B.]

Where in an action against husband and wife, for an assault by the wife, the wife having no separate property, only had been taken in execution, the husband having become a bankrupt, the Court refused to discharge her out of custody.

Section 112 of the 12 & 13 Vict. c. 106, which takes away protection from bankrupts for debts arising from judgments in actions of assault, applies only to assaults committed by the husband, and not to those committed by the wife. Per Alderson, B.

THIS was an action of trespass against husband and wife for an assault committed by the wife, and judgment had been obtained against them for 159*l.* damages. The wife had been taken in execution. It appeared by the affidavits that she had no separate property, that her husband had become bankrupt and obtained his protection, and that he had not kept out of the way for the purpose of avoiding being taken in execution. An application had been made at Chambers for her discharge, which had been refused.

Bovill now moved the Court to discharge her out of custody. The Courts will discharge a married woman out of custody if she has no separate property, nor is likely to have any, and possesses no means of satisfying the debt. In addition to these circumstances there is, in this instance, the fact that the husband is a bankrupt; therefore unless the Court discharges her she may remain in prison for ever. The plaintiff might have taken the husband in execution, for he was not a bankrupt at the time of her arrest, and, consequently had no protection. The protection given by the last Bankrupt Act, 12 & 13 Vict. c. 106, s. 112, does not extend to debts arising from actions of assault. [*Alderson, B.*—Does not that mean assaults committed by the bankrupt himself? It does not include those committed by the wife.] He has never kept out of the way for the purpose of avoiding being taken. The plaintiff has elected to go against the husband, and so has abandoned his claim against the wife; for he has

attempted to prove his demand against the husband's estate under the bankruptcy; but the consideration of the proof was adjourned by the Commissioner, because he doubted whether the claims could be proved after one of the defendants had already been taken in execution. But this Court will not consider whether it is a debt proveable or not. The wife cannot take the benefit of the Bankrupt or Insolvent Acts, because she cannot execute the necessary warrant of attorney; *Ex parte Deacon* (a). [*Parke*, B.—Since 1 & 2 Vict. c. 110, s. 101, she can. Besides, her friends may come forward and pay the debt to release her from prison. What power have we to deprive the plaintiff of a right which he possesses by the law of the land?] In *Chalk v. Deacon and Wife* (b), it was held to be a matter entirely in the discretion of the Court. That was a case where the debt was contracted before marriage. So also in *Evans v. Chester* (c), and *Beynon v. Jones* (d). In this last case it is said, in a considered judgment, that “in modern times, the Courts—where judgment has been recovered against a husband and wife, and both have been taken in execution—have assumed the right of discharging the wife out of custody, if she has no separate property, on no other ground, apparently, than that it is hard to detain in custody a defendant who cannot, by law, acquire property wherewith to satisfy the debt. This, it must be admitted, is rather making the law than administering it. At the same time, the practice has prevailed so long in the case of a judgment against husband and wife, that in such a case we should probably not feel ourselves warranted in deviating from the ordinary course.” And the judgment then proceeds to draw a distinction between the case of a rightful judgment against a married woman alone, and the case of a judgment against husband and wife. From *Ferguson v. Clayworth and Wife* (e), it may be col-

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(a) 5 B. & A. 759.

(b) 6 Moore, 128.

(c) 2 M. & W. 847.

(d) 15 M. & W. 566, 9.

(e) 6 Q. B. 269; S. C. 2 D.
& L. 165.

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lected that the general rule is, that a feme covert is entitled to her discharge, unless it appears that she has separate property. There are some notes of cases in *Strange* which bear on this subject (a). The general principle of the law being that a married woman has no separate existence, the Court will discharge her, on the ground of humanity; for it would be tyrannical to imprison her when she has no property to discharge the demand, and no means of obtaining any.

PARKE, B. (b).—I think we ought not to exercise our discretion by doing an act against the general principles of the law; and I am, therefore, of opinion that this rule ought to be refused. The case of *Beynon v. Jones* (c) appears to me to be correct. There have been occasions indeed, upon which the Court have in their discretion, released the wife when taken in execution upon a judgment against her; but I quite agree with what is stated in the judgment in that case, that the practice appears to rest on no principle whatever. As, however, the Court held in *Chalk v. Deacon* (d) that it had the power, in its discretion to release the wife, and as that power has since been frequently exercised, we feel bound by the precedents; but at the same time, will follow them only in similar cases. Where both husband and wife are taken, and the wife has no separate property, there may be a reason for discharging her, on the ground that the plaintiff gets all he can from her by retaining the husband; and whether that reasoning be satisfactory or not, we should probably release her in such a case. But here the wife *alone* is taken, and there being no precedent of a similar case, I think we have no right to interfere.

ALDERSON, B.—I agree that there is no principle to justify our interference in cases like the present. There are, indeed, certain precedents upon the subject, but they

(a) 2 Stra. 1167, 1237, 1272.

(c) 15 M. & W. 566; S. C.

(b) *Pollock*, C. B., had left the Court.

3 D. & L. 667.

(d) 6 Moore, 128.

do not apply in this case; and therefore, I think we cannot interfere. We should be depriving the plaintiff of a remedy, which we have no right to do, and extending a practice which is not reconcileable with principle. I think, therefore, this rule ought to be refused.

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PLATT, B., concurred.

Rule refused (*a*).

(*a*) Reported by Leofric Temple, Esq.

SKINNER *v.* The LONDON, BRIGHTON, and SOUTH COAST RAILWAY COMPANY. *January 21.*

[In the Exchequer of Pleas.

Coram *Pollock, C. B., Parke, B., Alderson, B., and Platt, B.*]

A RULE had been obtained, calling on the plaintiff to shew cause why he should not pay the costs of the day for not proceeding to trial.

It appeared that at the trial a variance was discovered between the evidence and the record, and the plaintiff obtained leave from the Judge to withdraw the record and amend the declaration, under the 3 & 4 Wm. 4, c. 42, s. 23. In drawing up the order, the associate made it by consent, and with no mention of costs whatever.

At the trial, a variance being discovered, the record was withdrawn, and leave to amend granted under 3 & 4 Wm. 4, c. 42, s. 23. The order was drawn up by consent, and no mention was made of the costs. Held, that the plaintiff, for whose benefit the amendment was made, must pay the costs of the day.

W. H. Watson shewed cause. This was an action for negligence; and at the trial there was a variance, and an application was made to amend, which was granted, and the record withdrawn. In drawing up the order, it was done by consent, and no mention was made of the costs;

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and the Court can only act on the order which was made at the time. Under the act of Parliament (a), the Judge alone, at the trial, has power to give costs. The act says, "and in case such variance shall be," &c., "not material," &c., "then such Court or Judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record, or postponing," &c., "as such Court or Judge shall think reasonable." [*Alderson*, B.—Postponement means, to put off the trial to some time at the same sittings; withdrawing the record, to some other sittings.] The Judge has the power of ordering costs to be inserted in the order, if he thinks them reasonable, or of leaving them out at his discretion. In this case he has not exercised his power of giving them. The question turns altogether on the construction of this act of Parliament.

Bramwell, in support of the rule, was not called upon.

POLLOCK, C. B.—I think this rule ought to be made absolute. At the trial there was a variance, and I allowed the record to be withdrawn and the declaration amended. Nothing is said in the order about costs; but the withdrawal was for the benefit of the plaintiff, and he is liable to pay the costs.

PARKE, B.—I am of the same opinion. The plaintiff is in the same situation as if he had withdrawn the record before the jury were sworn. But in this case, after the jury are sworn, a variance between the proof given by the plaintiff and his declaration is discovered, and by agreement between the parties the record is withdrawn, and an amendment made prejudicial to the defendant. The Judge in the order has said nothing about the costs. Then who is to pay them? The plaintiff might have been nonsuited,

(a) 3 & 4 Wm. 4, c. 42, s. 23.

and the record is withdrawn to avoid that: as it is for his benefit, he ought to pay the costs; for it cannot be contended that all this is to be done without the party causing the costs paying them.

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ALDERSON, B.—The plaintiff misled the opposite party, and then seeks to set himself right; and he must pay for doing so.

PLATT, B.—The power given by the act is to amend, the rest is the consequence.

Rule absolute.

SAME v. SAME.

January 28.

[In the Exchequer of Pleas.

Coram Pollock, C. B., Parke, B., Alderson, B., and
Platt, B.]

ON a subsequent day in the same Term,

W. H. Watson moved for a rule to shew cause why this case should not be tried as a common jury cause.

It appeared that issue having been joined, a special jury had been struck, and the cause went down to trial, when an order was made for amending the declaration, and the record was withdrawn.

W. H. Watson. The question is, whether, after an amendment like this, under the act of Parliament (a), it is the same issue. The record was withdrawn, the amendment made, and the trial postponed, which makes a new cause altogether. In fact, the plaintiff has declared anew, and the defendants may be taken to have pleaded a new plea;

Where at nisi prius the record is withdrawn, by leave of the Judge, for the purpose of making an amendment, which is accordingly made, it is not a new, but an amended issue. Therefore, where a special jury had been struck, the Court refused an application to try it by a common jury.

(a) 3 & 4 Wm. 4, c. 42, s. 23.

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since, although it is the same as that which was pleaded to the old declaration, they might have pleaded another, if the amended declaration had made it necessary. [*Pollock*, C. B. — Suppose that the day before the trial an application is made to a Judge to amend, and he makes the amendment upon the terms of the applicant paying the costs, will that make the cause a new one?] If money had been paid into Court under the amendment, that would have made it an entirely new issue.

PARKE, B.—No: that would only be an amended issue.

ALDERSON, B., and PLATT, B., concurred.

PER CURLAM.

Rule refused (*a*).

(*a*) Reported by Leofric Temple, Esq.

In the matter of the recognizances of JOHN THORNTON and two Others, estreated into this Court.

January 22.

The QUEEN v. THORNTON.

[In the Exchequer of Pleas.

Coram *Pollock*, C. B., *Alderson*, B., *Parke*, B., and *Platt*, B.]

Recognizances to prosecute an indictment removed by certiorari into the Queen's Bench, under the 5 & 6

Wm. & M. c. 11, were estreated into the Exchequer. The principal had gone through the Insolvent Debtors' Court, and was in extreme poverty. The Court ordered proceedings against him to be stayed, but refused to interfere as to the bail.

IN this case it appeared from the affidavits and petition, that John Thornton, on the 23rd of October, A. D. 1846, conceiving himself to be injured and aggrieved by the diverting, turning, and stopping up of a certain footpath, appealed against the

confirmation of the certificate of the justices. The certificate was, however, confirmed at the quarter sessions, and he was ordered to pay the surveyors of the highways of Kirby Lonsdale the costs of the said appeal, which amounted to 47*l.* 18*s.* 6*d.* In consequence of his poverty he was not able to pay this sum, and at Easter, 1847, a bill of indictment was prepared and found against him at the Quarter Sessions for the county of Westmoreland, for a misdemeanor, in disobeying the order of sessions, by omitting to pay the said costs of the said appeal. He removed the indictment, by writ of certiorari into the Queen's Bench, and thereupon, together with Henry Robinson and Miles Hodgson, entered into the usual recognizance, himself in 80*l.*, and two sureties in 40*l.* each, conditioned that he should appear and plead to all indictments whereof he stood indicted whatsoever, and at his own proper costs and charges should cause the issue or issues that might be joined thereon to be tried at the next assizes for Westmoreland, and should give due notice of such trial to the prosecutor or his attorney, and should appear from day to day in the said Court, and not depart until discharged by the said Court. In the month of August, 1847, the defendant was tried and found guilty, subject to the opinion of the Court of Queen's Bench on certain points of law, which were ultimately determined against him. He subsequently came up for judgment, and, in pursuance of the sentence of the Court, was imprisoned for the space of two calendar months. In the month of December, 1848, payment of the costs of the surveyors in prosecuting the indictment, amounting to 79*l.* 2*s.*, was demanded; and not being able to pay them, he was taken in execution, and on the 27th of July, 1849, took the benefit of the Insolvent Debtors' Act, and was discharged out of custody. His affidavit stated that he was fifty-six years of age, and depended on his labour as a journeyman shoemaker for support; that he was very poor, and that he had lately become so weak of sight

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that he could hardly earn as much as would support him. On the 11th of June, 1849, the recognizances were ordered to be estreated into the Court of Exchequer. His petition, which was framed upon the 4 Geo. 3, c. 10, prayed that all further proceedings upon the recognizances estreated into the Court of Exchequer might be stayed, and that the petitioner and the said recognizance might be discharged.

Pashley, in support of the petition. The Court will order the proceedings to be stayed and the petitioner to be discharged, on the ground of his poverty. That is a sufficient reason at common law (a), independently of the powers conferred on the Court by the 4 Geo. 3, c. 10, for the Court to interpose its authority in favour of the defendant. The prosecutors have themselves to blame if they are the sufferers on this occasion. They ought not to have indicted him for disobedience of the order in the first instance, thereby creating more costs, but they should have proceeded in a summary way, under s. 103 of the Highway Act (5 & 6 Wm. 4, c. 50). Notice of this petition has been given to the law officers of the Crown, who do not appear to oppose it. The Court will consider, in deciding upon this matter, that these costs have been incurred in defending a public right. As to discharging the bail, it is submitted, that they are not liable for the costs; every thing in the condition of the recognizance having been done and complied with. The case has been tried according to the terms of the recognizance which is all that the bail undertook should be done. But even if they are liable, the Court will discharge the recognizances in the exercise of the equitable jurisdiction which they possess under the act 4 Geo. 3, c. 10. It appears that this Court has also the power to discharge recognizances by their common law juris-

(a) See *Price's Law of the Exchequer*, p. 443.

diction (a), and though these sureties have no plea of poverty, still the Court will relieve them. [He referred to the 5 & 6 Wm. & M. c. 11, s. 2 (b); *Reg. v. Sydserff and Another* (c)].

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Ramshay, for the prosecutors, was not called upon.

POLLOCK, C. B.—The sureties have entered into a recognizance, in respect of which the 5 & 6 Wm. & M. c. 11, s. 3, says, “that the said recognizance shall not be discharged till the costs taxed shall be paid.” We must act upon a fair construction of that act, and, therefore, refuse to discharge them. If they are not liable to pay the amount of the recognizance, they can make that answer to any proceedings that are taken against them. As to the principal, all proceedings against him in respect of this matter will, on account of his poverty, be stayed for the present.

PARKE, B.—We must decide this as to the sureties, according to the words of the act. They are sureties for the payment of the costs. Those costs have not been paid, and there appears no reason why the prosecutors should not be fully indemnified. They will, therefore, not

(a) *Price's Law of the Exchequer*, 443, and *Manning's Exchequer Practice*, 319.

(b) An Act to prevent delays of proceedings at the Quarter Sessions of the Peace. Sect. 2 requires, where cases are removed by certiorari, recognizances to try at the next assizes, to be given.

Sect. 3 enacts, “that if the defendant prosecuting such writ of certiorari be convicted of the offence for which he was indicted, that then the said Court of King's Bench shall give reasonable costs

to the prosecutor, if he be the party grieved or injured, or be a justice of the peace,” &c., “or overseer of the poor, or any other civil officer who shall prosecute upon the account of any fact committed or done, that concerned him or them, as officer or officers to prosecute or present, which costs shall be taxed according to the course of the said Court,” &c.; “and that the said recognizance shall not be discharged till the costs so taxed shall be paid.”

(c) 2 D. & L. 564.

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be discharged; though the proceedings against the principal may be stayed for the present.

ALDERSON, B.—The 5 & 6 Wm. & M. c. 11, s. 3, does not say that the recognizance is to be discharged, but quite the contrary. The sureties undertake to do something, just the same as the principal. He makes default in doing what they undertake he shall do; then they ought to do it for him.

PLATT, B., concurred.

Rule accordingly (*a*).

(*a*) Reported by Leofric Temple, Esq.

January 24, 26. In re a Complaint or Suit in the County Court of
MONTGOMERYSHIRE,
Between EDWARD EDWARDS,
and
JOHN ROGERS.

[In the Exchequer of Pleas.

Coram Rolfe, B., sitting alone.]

A plaint in the County Court for 20*l.* damages was removed by certiorari into the superior Court. Another plaint, including the same cause of action, but laying the damage at 5*l.*, was then immediately entered. *Held*, that the pendency of the first action in the superior Court was no ground for issuing a prohibition in the second to the County Court.

A RULE had been obtained to shew cause why a writ of prohibition should not issue in this case; or why a writ of certiorari should not issue, to remove the plaint from the County Court into this Court. It appeared by the affidavits, that, on or about the 2nd of November, 1849, a plaint was entered in the County Court of Montgomery-

shire by the plaintiff, who is a farmer, against the defendant, for the amount of 20*l.*, for damages alleged to have been done, between the 10th of November, 1843, and the 30th of October, 1849, by the gases which arose from the working of certain lime-kilns of the defendant, to a certain close of the plaintiff, and the crops thereon. On the 16th of November, 1849, this first action was removed by the defendant into the Court of Exchequer by writ of certiorari, on the ground that the matters of the plaint involved points of law of considerable importance and difficulty. On the 1st of December, 1849, another plaint was commenced by the same plaintiff against the same defendant in the County Court of Montgomeryshire for 5*l.*, for damages alleged to have been done, between the 10th of November, 1843, and the 30th of November, 1849, by the gases arising from the working of the same lime-kilns to the same close, and the crops thereon. On the 17th of December, the second plaint came on for hearing in the County Court, and the defendant by his counsel pleaded the pendency of the first plaint in the superior Court; which plea was entered upon the minutes of the proceedings of the Court, and the cause, after being part heard, was adjourned until the 26th of January, 1850. The affidavits stated that the second plaint involved points of law of great importance and difficulty, and could not be fairly tried except by one of the superior Courts.

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Unthank shewed cause. The second plaint cannot be removed into the superior Courts, because the damages are only laid at 5*l.*; and the 9 & 10 Vict. c. 95, s. 90, enacts, that "no plaint entered in any Court holden under this act shall be removed" into the superior Courts, "unless the debt or damage claimed shall exceed 5*l.*"

[*Hake*, who appeared in support of the rule, abandoned this part of it.]

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Unthank. Then the only question is, can a writ of prohibition issue? There are no grounds for granting it here; and even if there were, it would only be doing indirectly that which cannot be done by direct means. A prohibition only issues where an inferior Court exceeds its jurisdiction, and cannot supersede it unless there be that excess. Here the County Court has jurisdiction, and the Legislature has said that, in cases similar to this, the superior Courts shall not interfere by certiorari. In *Comyn's Digest* (a) it is said, a prohibition will be granted to the Cinque Ports, if they "proceed for the cause of a suit well commenced at law;" and the case of *Williams v. Lister and Others* (b) is given as an authority. But that case only decides, that if an inferior Court attempt to restrain a party from suing in a superior Court, prohibition will go. In that case, the plaintiff brought trespass against the defendants in the superior Courts, and then the defendants preferred their bill in the Chancery of Dover, alleging a custom, &c., and praying to have the benefit of that; and upon hearing the case in that Court of Chancery, the plaintiff was decreed not to proceed in his cause of trespass here. And the Court held that a prohibition lay; for it is not in the power of an inferior Court to stay the proceedings in a cause that is first attached here. There is no hardship on the defendant in this case, because he may plead the judgment recovered and payment under it in the action in the County Court, in bar to the action which has been removed into this Court. The mere fact of there being another action in the superior Court is no ground for stopping this; for where an action is removed by habeas corpus, &c. by the defendant, the plaintiff is not bound to follow it, for the plaintiff cannot be non proessed; *Norrish v. Richards* (c). And here the plaintiff is willing to abandon

(a) Tit. "Prohibition," (A. 1.)

(b) Hardres. 475.

(c) 5 N. & M. 268; S. C. 3 A.

& E. 733.

the first suit. [He referred to the case of *Hill v. White* (a).]

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Hake, in support of the rule. This is a matter of very great consequence to the defendant, for if this action be maintainable, the defendant is incurring a fresh cause of action every day. In this case, there cannot be a jury of right, for the damages laid only being 5*l*, a jury cannot be summoned without the sanction of the Judge (b); so that the defendant is entirely in the hands of one man. He desires the direction of a Judge of the superior Courts at the trial, as to his right to carry on his business. [*Rolfe*, B.—The 58th section of the County Court Act does not apply in this case; for no title comes into question here (c).] If this second plaint is not restrained, a multiplicity of actions is encouraged; for sect. 63 says, “that it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said Courts,” &c. Now here there are two suits brought for the identical cause of action. Then the inferior Court is exceeding its jurisdiction in entertaining two suits for the same cause of action, and ought, therefore, to be restrained. In *Re Aykroyd* (d), “cause of action” is defined to mean “cause of one action.” This case is within that case as to splitting demands; for in the first plaint the plaintiff seeks to recover 20*l*. damages, accrued between the 10th of November, 1843, and the 30th of October, 1849; in the second plaint, his damages are laid as accruing between the 10th of November, 1843, and the 30th of November, 1849, being one month more than

(a) 6 Bing. N. C. 26; S. C. 8 Scott, 249; 8 Dowl. 13.

(b) 9 & 10 Vict. c. 95, s. 70.

(c) 9 & 10 Vict. c. 95, s. 58, provides, “that the Court shall not have cognizance of any action of ejectment, or in which the title

to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question,” &c.

(d) 1 Exch. 479; S. C. 5 D. & L. 701.

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in the first case; so that he is clearly dividing and splitting his cause of action. [*Rolfe*, B.—There is clearly no splitting here. The words of the act are, “divide any cause of action.” There is no division, but there is a second action brought for something more than is comprised in the first action, viz., damage from the 30th of October, 1849, to the 30th of November.] A prohibition ought to go, because the Judge of the County Court is trying one action while another is existing for the same cause; which the superior Court has said is only fit to be tried by themselves. For “if the Spiritual Court proceeds to the trial of a custom or prescription, which are triable only by the common law” (*a*); or if the Cinque Ports “confound law and equity together” (*b*), a prohibition will issue, because, as in the present case, they are exceeding their jurisdiction.

Cur. adv. vult.

ROLFE, B., now gave judgment.—In this case I think I have no jurisdiction to grant a writ of prohibition. The suit is for a demand of 5*l.*; and the Legislature says that such a case must be tried in the County Court, so that this action cannot be removed by certiorari. If the statute is wrong, that is the fault of the Legislature, which has thought proper to make such an enactment. I have no doubt that the case will be properly decided by the Judge of the County Court, and the Legislature thinks so also. It is true that there is another action, which has been removed into the superior Court; but the plaintiff is not bound to go on with that unless he thinks fit, for he can elect to abandon it at his discretion. As Mr. *Unthank*, in his argument, said that there was no intention of proceeding with the first action, I shall hold the plaintiff to that. The

(*a*) Com. Dig. tit. “Prohibition,” (F. 14.)

(*b*) Com. Dig. tit. “Prohibition,” (A. 1.)

rule, therefore, will be discharged; the plaintiff undertaking not to proceed with the first action.

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Rule accordingly (a).

(a) See *Byrne v. Knipe*, 5 D. & L. 659.
Reported by Leofric Temple, Esq.

DUCK v. BARTON.

January 31.

[In the Exchequer of Pleas.

Coram *Alderson, B., sitting alone.*]

THIS was a rule, calling on the plaintiff to shew cause why he should not bring the writ of trial and sheriff's return into Court, and file the plea roll, and why the defendant should not be at liberty to enter a suggestion thereon to deprive the plaintiff of costs, pursuant to the statute 9 & 10 Vict. c. 95, s. 129.

The affidavits of the defendant in support of the rule, after stating that this cause, which was an action of debt, had been tried before the sheriff, and that the plaintiff recovered a verdict for 11*l.* 13*s.* 3*d.*, alleged "that before and at the time this action was brought, he, this deponent, carried on his business, that is to say, the business of a tin plate worker, at the Saw Mills, York Road, Lambeth, within the district of Southwark, in the county of Surrey, and within the jurisdiction of the Southwark County Court, holden under the provisions of the said act; that the cause of action arose in some material point within the jurisdiction of the County Court of Southwark aforesaid; and that at the time of the com-

The Court refused to permit a suggestion to be entered under the 9 & 10 Vict. c. 95, s. 129, on an affidavit which stated that at the time the action was brought, the defendant carried on his business within the jurisdiction of the Southwark County Court; and that the plaintiff did not dwell more than twenty miles from the defendant; but dwelt within twenty miles of the defendant; on the ground that it did not shew distinctly that the defendant dwelt within twenty miles from where the plaintiff dwelt.

that the defendant dwelt within twenty miles from where the plaintiff dwelt.

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mencement of this action the plaintiff did not dwell more than twenty miles from deponent, but dwelt within twenty miles from this deponent; and that the plaintiff then dwelt at No. 83 in the London Road, in the said county of Surrey aforesaid, and within one mile of the York Road, Lambeth aforesaid, and within the jurisdiction of the County Court of Surrey aforesaid."

Pitt Taylor shewed cause. The 128th section of the County Courts' Act provides, that a plaintiff shall not be deprived of costs under the 129th section, if, among other things, he dwells more than twenty miles from the defendant's residence; and in order to entitle himself to enter a suggestion to deprive the plaintiff of costs, the defendant must distinctly shew that the case does not fall within this as well as the other exceptions contained in the 128th section. But this affidavit does not allege that the defendant, at the time this action was brought, dwelt within twenty miles from the residence of the plaintiff, but only that he dwelt within that distance from the place where the defendant carried on business. In *Peterson v. Davis (a)*, it was held, that to entitle a defendant to enter a suggestion to deprive the plaintiff of costs, under the 112th section of 10 & 11 Vict. c. 71, (the London Local Court Act), which is similar to the 128th section of the County Courts' Act, it must be shewn distinctly that the plaintiff, at the time of commencing the action, dwelt within twenty miles of the defendant's place of abode; and a suggestion "that the plaintiffs did not, at the time of the commencement of the suit, dwell more than twenty miles from the place where the defendant carried on his business," &c. was held bad on demurrer. In *Johnson v. Ward (b)*, an affidavit, stating that "the plaintiff did not dwell more than twenty miles from the defendant, that

(a) 6 D. & L. 79; S. C. 6 C. B. 235.

(b) 6 D. & L. 720.

is to say, that the defendant dwelt at No. 33, John Street," &c., was held to be insufficient, on the ground that it did not state where the plaintiff resided. In *Brooker v. Cooper* (a), this Court laid down, that the defendant must shew affirmatively that the case is not within the exceptions contained in the 128th section, and held that the words, "within a short distance" of the defendant, were insufficient.

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Pearson, in support of the rule. This affidavit follows the words of the act, and that is sufficient. [*Alderson*, B.—Suppose it should turn out that the defendant dwelt more than twenty miles from the plaintiff, and he were indicted for perjury, and the perjury assigned was, that the defendant had sworn that he dwelt within twenty miles of where the plaintiff dwelt, would this affidavit support such an indictment?] A man who swears in the words of the act, must be taken to swear in the sense in which the words are there used. In this case the language of the affidavit is distinct, and not qualified, as it was in *Johnson v. Ward*.

ALDERSON, B.—I am to determine whether a suggestion can be entered in this case to deprive the plaintiff of costs, on the ground that the defendant dwells within twenty miles of the plaintiff's dwelling. But the defendant does not shew distinctly where he dwells, but only where he carries on his business. On the authority of *Peterson v. Davis*, that is not sufficient. And I think that case was rightly decided. The Court there adopted a plain rule, which the defendant has not followed, and he is, therefore, not entitled to the relief which he has asked. If I permitted the defendant to enter a suggestion here, as in *Peterson v. Davis*, it would be demurred to; the permission, therefore, would do him no good, while, at the same time, it would do

(a) 3 Exch. 112; S. C. 6 D. & L. 199.

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the plaintiff an injury. The rule must, therefore, be discharged, with costs.

Rule discharged accordingly.

Pearson. The defendant may wish to have the opinion of a Court of error as to the correctness of the decision in *Peterson v. Davis (a)*.

ALDERSON, B.—The amount is too small to make it desirable that this case should be carried up into a Court of error.

(a) 6 D. & L. 79; S. C. 6 C. B. 235.

May 24,
June 7, 1849.
February 25,
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KEIGHLEY v. GOODMAN.

[In the Common Pleas.

Coram *Wilde, C. J., Coltman, J., Maule, J., and Cresswell, J.*]

The 91st section of the County Courts' Act—which enacts that no person, except an attorney, shall recover any sum for acting on behalf of any other person in the County Courts; and that no attorney shall have or recover "therefore" any sum where the debt

or damage does not exceed 40s., or shall have or recover more than 10s. for his fees and costs, where the debt or damage does not exceed 5l., or more than 15s. in any other case—does not prevent an attorney from recovering from his client remuneration beyond the amounts therein mentioned, for services rendered by him out of Court in respect of the subject-matter of the plaint, and before its commencement.

J. BROWN, in Trinity Term, 1849, had obtained a rule for reviewing the Master's taxation under the following circumstances, which appeared from the plaintiff's affidavit in support of the rule. The plaintiff for some time previous, and down to the month of November, 1848, was employed by the defendant as his attorney; and in that month delivered to the defendant a bill for 73l. 9s. 2d., for the balance of which this action was afterwards brought, and also another bill for 20l. 19s. 2d. The latter bill was exclusively for business connected with a plaint in one of the new County Courts, in which the present defendant

was plaintiff; and twenty-one of the items of that bill—amounting together to about 10*l.*—were charges for business transacted in the matter before the entering of the plaint. On the 14th of April, 1849, the late Mr. Justice *Coltman* made an order referring the first bill to taxation, and a similar order was made on the 23rd by *Maule*, J., with respect to the second one. The Master reduced the former by the sum of 9*l.* 6*s.* 6*d.*, and disallowed the whole of the latter,—certifying that he had done so because he considered that the 9 & 10 Vict. c. 95, s. 91, limited the remuneration of an attorney to 15*s.* The amount thus taxed off in both bills was deducted from the larger bill; and as this deduction exceeded one-sixth of the original amount, the plaintiff was made to pay the costs of the taxation.

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Byles, Serjt., shewed cause. He cited *Ex parte Green*, *in re Clipperton* (a).

J. Brown was heard in support of the rule.

Cur. adv. vult.

MAULE, J., now delivered the judgment of the Court.—This was a motion to review the taxation of an attorney's bill. The Master had disallowed certain items for business done in conducting preliminary inquiries before commencing a suit in one of the County Courts established under the act of 9 & 10 Vict. c. 95. The ground of the disallowance was, that the 91st section of that act prevented the attorney from having or recovering for the services in question any larger sum than 15*s.*; and this construction of the section appears to have been adopted by the Court of Queen's Bench in the case of *Ex parte Green*, for which we were referred to the *Jurist*, vol. 12, p. 1044. Having heard the case argued on this question, and having taken time to

(a) Q. B. Trin. Vac. 1848, cited from 12 Jur. 1044.

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consider it, we find ourselves compelled to adopt a different construction of the section in question. That section begins by providing that no person but an attorney, or a barrister instructed by one, or a person allowed by the Judge to appear instead of such party, shall be entitled to appear in a County Court for any other party; and such person is, by the next clause, restricted from being entitled to be heard and argue a question as counsel without leave of the Judge. This is followed by a clause in the following words, "And no person, not being an attorney admitted to one of her Majesty's superior Courts of record, shall be entitled to have or recover any sum of money for *appearing or acting* on behalf of any other person in the said Court; and no attorney shall be entitled to have or recover *therefore* any sum of money, unless the debt or damage claimed shall be more than 40s., or to have or recover more than 10s. for his fees and costs, unless the debt or damage claimed shall be more than 5*l*., or more than 15s. in any case within the summary jurisdiction given by this act." The section then goes on to provide, that no fee exceeding 1*l*. 3s. 6*d*. shall be allowed for employing a barrister "as counsel in the cause;" and that the expense of employing a barrister or attorney shall not be allowed on taxation of costs, unless 5*l*. is recovered or claimed, or without the order of the Judge. The first clause regarding the description of persons who may be allowed to appear in the Court for another party, or instead of such party, seems very clearly to apply only to the appearance in the Court as a representative of a party, who would otherwise be obliged to appear for himself. The next provision, restricting the right to be heard and argue as counsel, also evidently applies only to a proceeding in Court. The clause in question begins with this provision, "And no person, not being an attorney admitted," &c., "shall be entitled to have or recover any sum of money for *appearing or acting* on behalf of any other person in the said Court." These words, certainly, in their literal construction, apply only to what is

done in the Court: and this is not only the literal sense, but the natural and obvious sense of the words; and the subject of the preceding part of the section, being matters in Court only, confirms this construction. Indeed, it would be difficult, by affirmative words, more expressly to confine the enactment to what is done in Court than by those actually used,—“appearing or acting on behalf of any other person in the said Court.” The words next following, on which the present question immediately arises, are: “and no attorney shall be entitled to have or recover *therefore* any sum of money, unless the debt or damage claimed shall be more than 40*s.*, or to have or recover *more than* 10*s.* for his fees and costs, unless the debt or damage claimed shall be more than 5*l.*, or more than 15*s.* in any case within the summary jurisdiction given by this act.” Here the word *therefore* clearly is intended to refer to the preceding words, “for appearing or acting on behalf of any other person in the said Court;” so that the right to have or recover anything, in cases not above 40*s.*, is also taken away only in respect “of the appearing or acting” “in Court” on behalf of the party to the suit. It is true that the word “therefore” is not repeated in the provision as to cases where 10*s.* or 15*s.* may be had or recovered,—the words being, “or to have or recover more than 10*s.* for his fees and costs,” without saying “therefore;” but it appears to us, that this provision is to be considered as applying to fees and costs “for appearing and acting on behalf of any other person in the said Court.” If this were not so, it would follow that, in cases not exceeding 40*s.*, an attorney might recover for what was done out of Court, but not in cases exceeding that amount. Indeed, the Court of Queen’s Bench, as reported in the *Jurist*, seem to have considered that the restriction of fees to 10*s.* and 15*s.*, as well as the preceding one which deprives the attorney of any claim in cases not exceeding 40*s.*, should be understood of fees “for appearing and acting in Court on behalf of another,” and expressed that opinion in the commencement of their judgment; observing, that “the

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words of the section are very clear, ‘that no attorney shall be entitled to have or recover therefore’ (that is, for appearing or acting on behalf of any other person in the County Court) more than the sums there specified.”

It appears, therefore, on considering the words of the enactment,—taking the language of the Legislature in its ordinary sense,—that the restriction in question does not apply to business done out of Court before a suit is commenced; and we think that, looking at the general scope of the enactment, we ought to come to a similar conclusion. The subject of the section is proceedings in County Courts,—a very fit subject of regulation in an act for establishing such Courts. The act, certainly, contemplates that the hearing of cases in the County Courts will usually be short and summary, and, therefore, the limitation of fees for acting for a party at such a hearing is a natural incident to such Courts, and such limitations are not unusual in respect of proceedings in Courts. But when one man employs another to do work and labour for him for a reasonable remuneration, it seems unreasonable to say the contract shall not be binding if the employment end in a suit in a County Court, but shall be binding if it do not. We think such a restriction as this would be, on the liberty of entering into such contracts as the parties think fit, ought not to be implied unless by a necessary implication; and there is none such here.

The Court of Queen’s Bench are reported to have said, in *Ex parte Green*, that “the Legislature did not intend to make any distinction between an attorney’s right to recover from the opposite party, and from his own client;” but we think there is no reason for construing the act as abolishing the existing distinction between the costs which may be allowed between party and party, and the remuneration which an attorney may recover from his client. The framers of the act use appropriate words in speaking of both kinds of claim; the attorney’s against his client being described as a right “to have or recover,” whilst costs

between party and party are described as "costs allowed on taxation." On the whole, we think there is nothing in this section to take away the right of an attorney to be paid a reasonable amount for work done out of Court before the institution of a suit, or to take away the right of the superior Courts, which alone have jurisdiction to tax attorneys' bills and to allow a reasonable remuneration for this description of labour. The rule must, therefore, be made absolute.

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Rule absolute (a).

(a) In the case of *In re Toby*, decided in Trinity Term, 1850, reported *post*, the Court of Queen's Bench overruled their former decision in *Ex parte Green*, and adopted the same construction as that taken by the Court of Common Pleas in the above case.

CHAPMAN and Another v. MILVAIN.

January 18.
February 25.

[In the Exchequer of Pleas.

Coram Parke, B., Alderson, B., and Platt, B.]

COVENANT. The declaration set out the deed of copartnership of the Newcastle, Shields, and Sunderland Union Joint Stock Banking Company, by which the defendant covenanted with the plaintiffs to pay calls made upon shares held by him in the said company.

First plea,—after setting out the deed on oyer,—that before and at the time of the accruing of the alleged causes of action in the declaration mentioned, the said banking company were, and still are, a copartnership, carrying on business as bankers, within the 7 Geo. 4, c. 46; and that before and at the time of the accruing of the said causes of action, there were and are certain persons, (naming them), public officers

A joint stock company, constituted under the 7 Geo. 4, c. 46, cannot sue the subscribers for calls in the names of the persons with whom the covenant to pay them, contained in the deed of settlement, was entered into; but must bring the action in the name of their public officer, under

sect. 9 of the statute;—the provision in that section that all actions "shall and lawfully may" be brought in the name of the public officer being obligatory, and not permissive only.

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of the said copartnership, under and according to the statute; and that the sums of money sought to be recovered and the causes of action in the declaration mentioned, were and are debts, claims, and demands, due to the said copartnership, and relating to the concerns of the same Verification.

Special demurrer and joinder.

Granger, in support of the demurrer. The question is whether the covenantees of the deed may bring this action or whether it should have been brought in the name of the public officer of the bank. By the 7 Geo. 4, c. 46, s. 9, it is enacted, "that all actions and suits," &c., "and all proceedings at law or in equity," &c., "to be commenced or instituted for or on behalf of any such copartnership against any person," &c., "whether members of such copartnership or otherwise, for recovering any debts, or enforcing any claims or demands due to such copartnership," &c., "shall, and lawfully may, from," &c., "be commenced or instituted, and prosecuted in the name of any one of the public officers nominated as aforesaid," &c. It has been decided that the company *may* sue on such a covenant as this in the name of their public officer, and the only question is, whether they *must* sue in his name. In *Pentland v. Gibson* (a), it was decided, that the action was properly brought in the name of the covenantee. In that case, by the deed of copartnership, the members for themselves, their executors, &c., covenanted with C. P., the secretary, to pay certain deposits. And to an action of covenant, brought by C. P. on this deed, the defendant pleaded, that before the commencement of the suit, C. P. ceased to be the secretary, and R. H. was duly appointed in his stead; that R. H. was the secretary at the time the action was brought; that by the 5 Geo. 4, c. 160 (b), the company "shall and may sue" in the name of their secretary; and that, therefore, R. H. should have brought the action. But it was held, on general demurrer,

(a) 1 Alcock & Nap. 310, (Irish).

(b) A private act (Ireland).

that the plea was insufficient, and that the action was properly brought in the name of C. P., the covenantee in the deed. It is true that in *Steward v. Greaves* (a), it was decided, that a debtor of the company must sue the public officer, and not the individual member, pursuant to the 9th section of the act; but there is a difference between the company being plaintiffs and defendants. Here they are the plaintiffs, and no injury can arise to the defendant by being sued by the covenantees, instead of the public officer. According to *Rex v. James* (b), and *Reg. v. Beard* (c), it seems that in an indictment for forgery, the intent to defraud may be laid either in the names of the trustees, or that of the public officer; and the same rule should apply in civil proceedings. [He also cited *Skinner v. Lambert* (d).]

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Hugh Hill, in support of the plea. It is compulsory upon a company to sue in the name of their public officer. That they may do so has been decided in *Wills v. Sutherland* (e); and it is now contended that they must. The words of the statute are obligatory, and they are to be construed according to their ordinary import. [He cited *Smith v. Goldsworthy* (f), and *Steward v. Greaves*.]

Granger, in reply.

Cur. adv. vult.

PARKE, B., now delivered judgment.—This is an action by two plaintiffs, the Messrs. Chapman, on a covenant with them by name, contained in the deed of copartnership of the Newcastle, Shields, and Sunderland Union Joint Stock Banking Company, made on the 1st of October, 1830. The different subscribers covenant, each one for himself, to pay calls duly made; and the defendant, being a subscriber,

(a) 10 M. & W. 711; S. C. 2
Hill 485, N. S.

(b) 7 C. & P. 553.

(c) 8 C. & P. 143.

(d) 4 M. & G. 477; S. C. 2
Hill 132, N. S.

(e) Exch., Trinity Term, 1849,
cited from 18 Law Journ. Exch.
450. This case will be reported
in 7 D. & L., and in 4 Exch.

(f) 4 Q. B. 430.

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is sued on his covenant, for nonpayment. The defendant craves oyer of the deed, which is set out; and then pleads, that the banking company was, and still is a company of persons united in copartnership for the purpose of carrying on the trade and business of bankers in England, according to the statute 7 Geo. 4, c. 46; that there were and are public officers of the copartnership, according to that statute, and that the sums of money sought to be recovered in the action, were debts, claims, and demands due to the copartnership, and relating to the concerns of the same.

To this plea there is a special demurrer; and the question is, whether the statute 7 Geo. 4, c. 46, s. 9, as to the right of a joint stock company to sue, applies to such a covenant as this; and, if it does, whether that part of the section is permissive or obligatory.

The section is to this effect: that all actions and suits against any person who may be at any time indebted to any such copartnership, carrying on business under the provisions of the act, and all proceedings at law or in equity, to be commenced or instituted for *or on behalf* of any such copartnership, against any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, for recovering any debts, or enforcing any claims or demands due to such copartnership, or for any *other matter* relating to the concerns of such copartnership, *shall and lawfully may*, from and after the passing of the act, be commenced or instituted, and prosecuted in the name of any one of the public officers for the time being of such copartnership, as the nominal plaintiff, for and on behalf of such copartnership; and that all actions or suits, and proceedings at law or in equity, to be commenced or instituted by any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, against such copartnership, *shall and lawfully may* be commenced, instituted, and prosecuted, against any one or more of the public officers for the time being of such copartnership, as the nominal defendant, for or on behalf of such copartnership; and that all indictments, informations,

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and prosecutions, by or on behalf of such copartnership, for any stealing or embezzlement of any money, goods, effects, bills, notes, securities, or other property of or belonging to such copartnership, or for any fraud, forgery, crime, or offence, committed against, or with intent to injure or defraud such copartnership, *shall and lawfully may* be had, referred, and carried on, in the name of any one of the public officers for the time being of such copartnership; and that in all indictments and informations to be had or preferred by or on behalf of such copartnership against any person or persons whomsoever, notwithstanding such person or persons may happen to be a member or members of such copartnership, it *shall be lawful and sufficient* to state the money, goods, effects, bills, notes, securities, or other property, of such copartnership to be the money, &c. of any one of the public officers for the time being of such copartnership; and that any forgery, fraud, crime, or other offence committed against, or with intent to injure or defraud any such copartnership, *shall and lawfully may*, in such indictment or indictments, be laid or stated to have been committed against, or with intent to injure or defraud any one of the public officers for the time being of such copartnership; and any offender or offenders may thereupon be lawfully convicted for any such forgery, fraud, crime, or offence; and that in all other allegations, indictments, informations, or other proceedings, of any kind whatsoever, in which it otherwise might or would have been necessary to state the names of the persons composing such copartnership, it *shall and may be lawful and sufficient* to state the name of any one of the public officers for the time being of such copartnership, and the death, resignation, removal, or any act of such public officer shall not abate or prejudice any such action, suit, indictment, information, prosecution, or other proceeding commenced against or by or on behalf of such copartnership, but the same may be continued, prosecuted, and carried on in the name of any other of the public officers of such copartnership for the time being.

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That the company *may* sue on a covenant such as this was hardly disputed; indeed it was not disputed, on the argument before us. That question must be considered as settled by the case of *Wills v. Sutherland* (a), and the prior cases there referred to. The only question argued was, whether they *must* sue. The case of *Steward v. Greaves* (b), decided that the part of the section which relates to actions *against* the company was obligatory on all who had cause of action against them. The words, "shall and lawfully may," are in their ordinary import obligatory, and ought, as was said in that case, to have that construction, according to the established rules, unless it would lead to some absurd or inconvenient consequence, or be at variance with the intention of the Legislature, to be collected from other parts of the act. The ordinary construction was, in that case, manifestly in accordance with the intention of the framers of the act. It would have entirely altered the nature of the obligation of the partners of a joint stock bank, to hold that they could be sued as individuals. There is not the same forcible reason for construing these words in their ordinary sense where the company are *plaintiffs*, but there is no reason why we should not. Indeed, it would be inconvenient to the covenantors to have their position altered at the option of the company. If the company chose to sue the covenantor in the name of the covenantee, the covenantee only would be liable to pay costs, in case of a nonsuit or verdict against him, and the defendant would have a set-off only of debts due from the covenantee; or, if the company chose to sue in the name of the officer, the company would be liable to costs, and the defendant have a set-off of the company's debts only. This we consider affords an additional ground for holding that the words are to bear their ordinary sense, and be held to be obligatory.

It will be said, then, that the company, if this construc-

(a) 18 Law Journ., Exch. 450.

(b) 10 M. & W. 711.

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tion is to prevail, could not take a security to a trustee who alone could have the title to sue,—a right which every natural person has,—and that it could not have been the intention of the Legislature to deprive companies of that privilege. We are not prepared to say that the company might not so word the security to their trustee as to avoid that inconvenience, if it be one, and to vest the sole right of action in the trustee; but on a covenant worded as this is, we do not think that object, if it existed, was accomplished.

We see no reason, therefore, for construing these words, which are, *primâ facie*, obligatory, in any other than their usual sense. If, indeed, this question had been concluded by a judicial decision, we should be bound by it, but the cases cited do not appear to be sufficient for that purpose. *Rex v. James* (a) reports the inclination only of the opinion of Mr. Justice Patteson, that the stat. 7 Geo. 4, c. 46, might not be imperative, as to laying the intent to defraud the public officer: and in the subsequent case of *Rex v. Beard* (b), where Mr. Justice Coleridge intimated a similar opinion, the point was just mentioned, not argued.

We are aware of the decision of the Court of Queen's Bench in Ireland (c), in which that Court held, that the private stat. 5 Geo. 4, c. 160, was only permissive, and that the company to which it applied had the option of suing in the name of the covenantee. But the language of that statute, as appears by the report, was different from the present, the 7 Geo. 4, c. 46; and seems to have been, according to its ordinary construction, permissive only.

Upon the whole, we think the words "shall and lawfully may," are obligatory, and ought to be so construed in this case; and, therefore, our judgment should be for the defendant.

Judgment for the Defendant (d).

(a) 7 C. & P. 553.

cock & Nap. 310, (Irish).

(b) 8 C. & P. 143.

(d) Reported by Leofric Temple,

(c) *Pentland v. Gibson*, 1 Al-

Esq.

February 5, 25.

THOMPSON v. INGHAM and BATTY.

[In the Queen's Bench.

Coram *Patteson, J., Coleridge, J., and Wightman, J.*]

Where it does not appear upon the face of the pleadings that the title is in question, the Judge of the County Court has jurisdiction to inquire whether it is so or not; but his decision on the point is open to revision in one of the superior Courts on motion for a prohibition on affidavit, and if that Court direct that the party shall declare, the question becomes one of evidence.

Prohibition. The declaration stated a plaintiff in the County Court

by B. against T., for use and occupation; that T. protested that the title of the land was in question; that it was in truth in question; but that the Judge proceeded. The plea stated that on T.'s protesting that the title was in question, B. denied it: that the Judge heard the evidence and arguments, and decided that the title was not in question, and did proceed to hear the case; and that on the hearing, neither party adduced any evidence or argument other than those which they adduced before: *Held*, on general demurrer, that the plea was bad; either because it admitted the statement in the declaration, that, in fact, the title was in question, in which case the Judge had no jurisdiction under the 9 & 10 Vict. c. 95, s. 1, or not admitting that statement, it denied that it could be permitted to be made by reason of the decision of the County Court Judge that the title was not in question, being final and subject to be reviewed by this Court.

PROHIBITION. The declaration stated that, on the 2nd of June, 1847, the defendant Batty prosecuted in the County Court of Westmoreland, at Kirkby Lonsdale in that county &c., before the defendant Ingham, then being Judge of the said Court, a certain plaint theretofore commenced by a certain summons in an action of contract, issued out of the said Court, for an alleged debt or claim of 4*l.*, for the alleged use and occupation by the plaintiff of a certain field of the said Batty, in the township of Kirkby Lonsdale, in the said county, and in which said action the said Batty was the plaintiff, and the now plaintiff the defendant. That the now plaintiff appeared in the said Court, and protested and insisted to the defendant, Ingham, the Judge thereof that the said Court ought not to have or take, and had not cognizance of the said action, for that in the said action the title to the said field was in question, &c. That, in fact, the title to the said field was in question in the said action. That the now plaintiff then insisted that the said field was the soil and freehold of the now plaintiff before, and at, and during all the time of the

alleged occupation of the same by the said now plaintiff, &c.; and the said Batty then alleged and insisted that the said field was, during all the time aforesaid, the soil and freehold of him the said Batty. That, nevertheless, the said Court, and the said Judge thereof, assumed to take and have cognizance of the said action, and proceeded to entertain, and try, and determine, and did in fact take cognizance of the same, and tried the said cause, and, after divers adjournments thereof, gave judgment therein in favour of the plaintiff in the said action, &c. The declaration then averred the now defendants were still proceeding in the said action, and concluded by praying that a writ of prohibition might issue to prohibit the defendants from further proceeding in the said action, and from carrying into execution the said judgment, &c.

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Plea, that when the now plaintiff so appeared and protested that the title to the said land was in question in the said action, the said Batty at the same time appeared and protested that the title to the said land was not in question in the said action, and then required the now defendant Ingham, as such Judge as aforesaid, to hear and determine the said action. That the said defendant Ingham having heard and considered all the evidence, allegations, and arguments which the now plaintiff produced in support of the protest and position that the title to the said field was in question in the said action, and all the evidence, &c. produced by the said Batty on the other side, &c., decided and adjudged that the title to the said land was not in question in the said action, and therefore heard and determined the said cause and gave judgment therein, as in the said declaration mentioned. But that on the hearing of the said cause, neither the said Batty, nor the now plaintiff, produced, made, or used any evidence, allegation, or argument, other than those which the said Judge so heard and considered, &c. Verification.

General demurrer and joinder.

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Martin, in support of the demurrer, referred to 9 & 10 Vict. c. 95, s. 58, and *Lilley v. Harvey* (a).

Watson, contra, referred to *Ex parte Rayner* (b); *Fearon v. Norvall* (c); *Owen v. Pearse* (d); *Brittain v. Kinnaird* (e); *Mould v. Williams* (f); *Reg. v. Dodson* (g); *Reg. v. Bolton* (h); *Reg. v. Higgins* (i); *Robinson v. Lenaghan* (k); *Thomas v. Hudson* (l); and *Bracton*, fol. 108, b.

The Court referred to *Rex v. Milnrow* (m), and *Rex v. Wrottesley* (n).

Cur. adv. vult.

The judgment of the Court was afterwards delivered by PATTESON, J.—The declaration states a plaint in the County Court by Batty against Thompson for use and occupation; that Thompson protested that the title of the land was in question; that it was, in truth, in question, but that the Judge proceeded.

The plea states that, on Thompson's protesting that the title was in question, Batty denied it; that the Judge (the other defendant in this action) heard evidence and arguments, and did consider, decide, and adjudge that the title was not in question, and did proceed to hear the case; and that, on the hearing, neither party adduced any evidence or argument other than those which they had adduced before. To this plea there is a demurrer.

If the plea, being in confession and avoidance, is to be

(a) 5 D. & L. 648.

(b) Ibid. 342.

(c) Ibid. 439.

(d) Ibid. 654, n. (c).

(e) 1 B. & B. 432; S. C. 4 Moore, 50.

(f) 5 Q. B. 469.

(g) 9 A. & E. 704.

(h) 1 Q. B. 66; S. C. 4 P.

& D. 679.

(i) 8 Q. B. 149, n. (d).

(k) 2 Exch. 333; S. C. 5 D. & L. 713.

(l) 14 M. & W. 353; S. C. 2 D. & L. 873.

(m) 5 M. & S. 248.

(n) 1 B. & Ad. 648.

taken to admit the statement in the declaration, that, in fact, the title was in question, it is clearly bad; for then the Judge had no jurisdiction under 9 & 10 Vict. c. 95, s. 58, and his thinking and deciding that he had would not give it him. But, assuming that the plea does not admit that statement, but rather denies that it can be permitted to be made, by reason of the decision of a competent Court that the title was not in question, the point will be, whether that decision is conclusive.

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The law on this subject, so far as regards the analogous case of magistrates' convictions, was fully discussed in *Reg. v. Bolton*; and it was there held, that where the charge is such as, if true, is within the magistrate's jurisdiction, the finding of the facts afterwards by the magistrate is conclusive; but that where the charge is not such as, if true, would be within the magistrate's jurisdiction, no finding of facts can alter it.

The present case is between those so put. The Judge has clearly jurisdiction, *prima facie*, to try a plaint for use and occupation. The pleadings, if there were any in the County Court, would not shew that the title is in question. The point, whether it is or not, must of necessity arise upon the evidence; and as soon as it appears that it is, the jurisdiction of the Court ceases. The Judge must of necessity determine that point for the time, because on it depends whether he hears the case on the merits. Is then his determination conclusive? We think that it is not. The objection is analogous to a plea to the jurisdiction in other Courts, which is, indeed, determined in the first instance by the Court in which it is pleaded, but is subject to a writ of error. The County Court gives no writ of error or appeal of any sort; but then it is presumed that a Court deals only with matters within its jurisdiction. If a doubt arises as to that question, we think it impossible to contend that any of the provisions of the act make the solution of that doubt by the Court itself final. If so, the question

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must be open to one of the superior Courts, on motion for a prohibition, by affidavit; and if that Court, as in the present case, directs that the party should declare, then the question becomes one of evidence. In either view of the plea, therefore, we are of opinion that judgment must be for the plaintiff.

Judgment for the Plaintiff.

January 18,
February 8.

HENRY MILVAIN v. JOSEPH MATHER, P. O., &c.

[In the Exchequer of Pleas.

Coram Parke, B., Alderson, B., and Platt, B.]

Assumpsit on a money demand against a joint stock banking company. Plea, (after setting out the deed of settlement, to which the plaintiff was a party), a set-off for calls due on shares held by the plaintiff. Replication, "not indebted:" Held, that the replication was bad; the set-off being founded entirely on the deed. Held also, that the plea was good.

ASSUMPSIT against the Newcastle, Shields, and Sunderland Union Joint Stock Banking Company, for money had and received, interest, and on an account stated.

The second plea as to 350*l.* parcel, &c. (after setting out the deed of settlement, sealed with the seal of the plaintiff, &c., of which it made profert), pleaded, by way of set-off, certain sums of money due from the plaintiff to the company, for calls upon certain shares of which he was the original holder. The third plea was a similar plea as to 1050*l.* other parcel, &c., the amount for calls due upon certain other shares, which had been transferred to the plaintiff and were then held by him.

Replication to each of the pleas, that the plaintiff was not, nor is indebted to the said banking company, modo et formâ.

Special demurrer to each replication, and joinder.

Granger, in support of the demurrer. This form of replication is bad, where a deed is the foundation of the

set-off; 1 *Chit. Plead.* (a); *Solomons v. Lyon* (b); *Glyn v. Thorpe* (c). And here the foundation of the set-off is the deed. Next, the pleas are good. This action is founded on 1 & 2 Vict. c. 96, which is made perpetual by 5 & 6 Vict. c. 85. That statute enacts, by the 4th section, that a shareholder shall not be at liberty to set off any dividends, due upon his shares, against any demand which the company, &c. may have against him; but it makes no provision for the converse case of a company claiming a set-off against a shareholder. The inference, therefore, is, that the company may set off a debt due to them; and as the cross claims here are clearly mutual debts, the pleas are good.

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Hugh Hill, contra. If the sums stated in the pleas constitute such debts as the company are entitled to set-off, the replications are good. "Where the specialty or record is but inducement to the action, and matter of fact is the foundation of it, nil debet is a good plea" (d). Here, the debts are founded not simply on the deed, but on matters of fact which arise subsequently to the deed. In those instances in which the shares have been transferred from a third party to the plaintiff, he will not have the deed. The liability on the deed does not arise until all provisions as to the mode of making calls, &c. are complied with; and the deed is, therefore, properly made matter of inducement. Indeed, the language of the pleas, "by means of the premises the defendant is indebted," shews that it is those premises which constitute the debt. [He cited the cases referred to in the note to *Jones v. Pope* (d); *The Dean and Chapter of Windsor v. Gover* (e); *Warner v. Theobald* (f); and *Blakesley v. Smallwood* (g).]

Granger was heard in reply.

Cur. adv. vult.

(a) Page 482, 6th ed.

(b) 1 *East*, 369.

(c) 1 *B. & A.* 153.

(d) 1 *Wms. Saund.* 38 a, n. (3).

(e) 2 *Wms. Saund.* 297, n. (1).

(f) *Cowp.* 588.

(g) 8 *Q. B.* 538.

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PARKE, B., now gave judgment.—We are of opinion that a general replication of “not indebted” to such a plea as this, the subject-matter of which arises altogether on the deed, is bad. It does not arise partly on the deed and partly on something else, as in the case of debt for an escape, in which case the judgment is merely introductory, and by way of inducement; but here, the obligation to pay the calls rests entirely on the deed, which is a covenant to pay it when certain things are done; and when those things are done, still the obligation is wholly on the deed. The replication, therefore, of “not indebted” is bad; for there is no authority that “not indebted” may be replied to a set off, if it could not have been pleaded to the action itself; for a set-off is the same as a cross action. But as this is a new point, we think the plaintiff ought to have leave to amend, upon payment of costs.

Leave to amend, otherwise judgment for the Defendant (a).

(a) Reported by Leofric Temple, Esq.

February 11,
12.

EASTON v. CARTER.

[In the Exchequer of Pleas.

Coram Parke, B., Alderson, B., and Rolfe, B.]

To a declaration in debt by the executor of P. R., the covenantee of a deed, the

DEBT by the plaintiff, as the executor of the last will and testament of Peter Rose, deceased. The declaration stated, that in the lifetime of the said Peter Rose, defendant, after craving oyer, of the letters testamentary, pleaded that the said P. R. died in the parish of Longfleet, and that before and at the time of his death he resided there, and had the said indenture there: that the parish of L. is a royal peculiar, and out of the jurisdiction of the archbishop of Canterbury; by reason whereof, the proving of the will, and the granting of probate of all the goods, &c., in respect of the debt and cause of action, of right belonged and appertained to the Queen, and not to the said archbishop: that the will was never proved before, nor were the letters testamentary ever granted by the Queen: that the said letters testamentary produced, &c., and granted by the archbishop, were of no effect against the defendant in respect of the said debt and cause of action in the first count mentioned, and save as aforesaid by the granting of these letters testamentary, the plaintiff never was executor of the will of the said P. R. Held, upon special demurrer, that the plea was in bar of the action altogether, and not in bar of the further maintenance. Held also, that the plea was good.

to wit, &c., by a certain indenture then made between defendant and one John Mitchelson, of the one part, and the said Peter Rose, of the other part,—profert,—the defendant covenanted with the said Peter Rose, that he, the defendant, and the said John Mitchelson, would pay or cause to be paid unto the said Peter Rose, or his executors, the sum of 700*l.*, with interest for the same, after the rate of 4*l.* 10*s.* per annum, upon a certain day, which had elapsed before the commencement of the suit, to wit, &c.—Breach, non payment. There was also a count upon an account stated. The declaration concluded with making profert of the letters testamentary of Peter Rose.

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Plea to the first count,—after setting out on oyer the letters testamentary which appeared to have been granted by the archbishop of Canterbury,—that the said Peter Rose died in the parish of Longfleet, in the county of Dorset, and before and at the time of his death the said Peter Rose was resident and commorant at that parish, and before and at the time of his death the said indenture was, and the said Peter Rose had the same in the said parish; that the said parish of Longfleet, during all the time aforesaid was, and from thence hitherto hath been and still is within her Majesty the Queen's royal peculiar jurisdiction of her Free Chapel of Great Canford, in the county aforesaid, and out of the jurisdiction of the archbishop of the said province of Canterbury; by reason whereof the proving of the said will of the said Peter Rose, and the granting probate of all and singular the goods, chattels, and credits of the said Peter Rose in respect of the said debt and cause of action in the said first count mentioned, which, during all the time aforesaid, was and is of the value of 5*l.*, of right belonged and appertained to her said Majesty the Queen, and not to the said archbishop of Canterbury; that the said will was never proved before, nor were letters testamentary of the said Peter Rose ever granted by her said Majesty the Queen, and that the said letters testamentary, so produced in Court and so granted by the said archbishop, are of no effect against

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the defendant in respect of the said debt and cause of action in the said first count mentioned; and save as aforesaid, by the granting of these letters testamentary, the plaintiff never was executor of the last will and testament of the said Peter Rose. Verification.

Special demurrer and joinder.

Maynard, in support of the demurrer. The plea is bad in substance and in form. It is no bar to the action generally, although it might have been good if pleaded to the further maintenance of it. As an executor claims under the will of his testator, and not under the probate, he has a right to bring an action before the probate is granted; *Wankford v. Wankford* (a). *Powell*, J., there says, "In the case of an executor, the not proving the will is only an impediment to the action; but the right of action is the same before probate as after." The plea does not shew that the plaintiff had not a good right of action at the commencement of the suit; the meaning of it is, that the plaintiff must grant oyer, and that he cannot do if he has not got probate. Where an action is admitted to be rightly brought, the plea is in bar of the further maintenance of the action; *Le Bret v. Papillon* (b). In *Thompson v. Reynolds* (c), a plaintiff sued as executor, and made profert of the letters testamentary in the usual form. The defendant did not crave oyer, but pleaded that the plaintiff never was nor is executor in manner and form, &c. The plaintiff replied that he was and continued to be executor. And it was held, that the plaintiff could recover on this issue, although he had not obtained probate till some months after the declaration. In this stage of the case it may be sufficient to produce a copy of the will, authenticated by any Court having jurisdiction in the matter. It is contended, on the part of the defendant, that the archbishop has no jurisdiction; and the decisions in the Ecclesiastical Courts lay down, that a royal peculiar is distinct from the

(a) 1 Salk. 299, 303.

(c) 3 C. & P. 123.

(b) 4 East, 502.

archbishop. There is a difference between letters of administration and a probate. In *Comber's case* (a), the Lord Chancellor said, "the administrator receives his right entirely from the administration, but the right of the executor is derived from the will, and not from the probate, as appears from an executor's having power to release or assign any part of the personal estate before probate; and a defendant at law cannot plead to any action brought by an executor, that the plaintiff has not proved the will." The proper course would have been to plead *ne unques executor*, and that is the only proper plea. Further, this is a pleading of evidence. If the probate were on an insufficient stamp, could that objection be taken upon the plea that there was no probate? [*Parke, B.*—The plaintiff must prove his declaration by the proper probate. If the stamp be insufficient, he cannot give any evidence of the probate.] [He also cited *Middleton's case* (b); *Sutherland v. Pratt* (c); 1 *Williams on Executors*, 239, 4th ed.; *Smith v. Milles, per Curiam*, (d); *Stokes v. Bate* (e); *Field v. Woods* (f).]

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Willes, in support of the plea. This is a different case from those arising out of the stamp laws. If there was a stamp law which applied to wills, then at the trial of a cause affecting real property, the question of stamp would arise. The question is simply, whether the person who brings an action as executor is not bound to prove himself so at the time of his declaration. In Courts of equity it is unnecessary to bring the probate into Court, but in Courts of law proof of it must be made, and a proper one must, therefore, have been obtained before declaring; *Thompson v. Reynolds* (g). The plaintiff must shew a will which

(a) 1 P. Wms. 766, 8.

(b) 5 Rep. 28.

(c) 11 M. & W. 296; S. C. 2 Dowl. 813, N. S.

(d) 1 T. R. 475, 480.

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(e) 5 B. & C. 491; S. C. 8 D. & R. 247.

(f) 7 A. & E. 114; S. C. 2 N. & P. 117; 6 Dowl. 23.

(g) 3 C. & P. 123.

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makes him executor, and he must do that by the probate of a Court having exclusive jurisdiction to grant it. It is laid down in 1 *Williams on Executors*, 242, 4th ed., that unless the action be founded on the actual possession of the executor, he cannot maintain an action before probate, because he must make proferat. [He referred to 1 *Wms. Saund.* 274, a, n. (3), 6th ed.]

Maynard, in reply, referred to *Gurney v. Rawlins* (a), as the only case like the present, but which was decided on another ground. He also cited *Smith v. Smith* (b), and 1 *Williams on Executors*, 249, 4th ed. [*Platt, B.*, referred to *Crosse v. Corbocke* (c), and *Viner's Abridgment*, tit. "Executor," (L 2).]

PARKE, B.—We are inclined to think the plea good, but we will consider the question.

Cur. adv. vult.

PARKE, B., now delivered judgment.—[After stating the pleadings and causes of demurrer, his Lordship proceeded thus:]—In this case there is no special demurrer upon the ground that the plea is pleaded in bar of the action generally and not in bar of its further maintenance. It was admitted in the argument, and properly, that the probate granted by the Prerogative Court did not operate on the debt, especially as the deed was, at the time of the testator's death, in a royal peculiar, over which the archbishop never had any jurisdiction, and that the case differs in that respect from that of *Lysons v. Barrow* (d), in which case, in an action for a simple contract debt, the prerogative probate of the archbishop of York, was held not to be void, but only voidable, where the defendant resided in a peculiar, not a royal peculiar, in the archbishop's province. But it was

(a) 2 M. & W. 87.

(b) 3 Hagg. 757.

(c) 2 Anderson, 132.

(d) 2 Bing. N. C. 486; S. C.

2 Scott, 721.

contended for the plaintiff, that the plea was bad for two reasons: first, that as the plea contained no allegation that it was in bar of the further maintenance of the action, it must be taken, as no doubt it must, to have been pleaded in bar of the action generally, and so was bad, as containing a defence only to the further maintenance of the action; and, secondly, that the plea was bad, as amounting only to an argumentative denial of the representative character, and not sufficiently confessing and avoiding; and further, as it was merely pleading evidence.

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We think both these objections are unfounded. It is unnecessary to decide whether the first objection could be made on general demurrer. Probably it could not; but even if it could, we think that the plea is perfectly good, and that it is really not in bar of the further maintenance of the action, but in bar of it altogether. For although it is true, that the executor may bring an action before he has obtained probate, yet he can do so only provided he produces the probate at the proper time when the law requires him to do so, namely, when in his declaration he makes profert, and the defendant craves oyer of it. This is explained in *Roll. Abr.* tit. "*Executor*," (A.), p. 917: "If an executor, before probate of a will, brings an action of debt on an obligation due to him as executor, but when he declares he shews it to the Court, though being proved after action brought, still the action is well brought, because he was executor before the probate. Although by law he is not permitted to sue before probate, yet that being proved, the impediment is removed *ab initio*, for by shewing the will to the Court he satisfies the ceremony which the law requires, which he had done as the law requires." Those are the words in *Rolle's Abridgment*. If he does not satisfy the condition so required, and remove the impediment *ab initio*, he has not brought the action properly, and ought, therefore, to be barred altogether. The other objection also is not well founded. The defence made by this plea is not that the plaintiff is not an executor of the testator's will, but

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that he has no authority to recover the particular sum due on the indenture, because the instrument itself was in a parish which was royal peculiar, and so the executor by the prerogative probate had no right whatever to recover the amount due upon it. The case closely resembles that of *Stokes v. Bate* (a), where the plaintiff sued on letters of administration granted by the bishop of Chester, and on a plea of *ne unques administrator*, the Court held the objection that the particular debt sought to be recovered was, at the time of the testator's death, in another diocese, was inadmissible, and that that fact ought to have been specially pleaded; and the plea in this case is framed accordingly to that suggestion. It admits that the plaintiff's general title as executor gave him an implied colour, but shews that he has no authority over the particular debt. In the case of *Stokes v. Bate*, the argument, that under the plea of *ne unques administrator*, the question, whether the plaintiff was administrator as to that particular debt sought to be recovered did not arise, did not prevail; nor ought a similar argument, that the meaning of the issue *ne unques executor* would be, that he was not executor at a particular date, to prevail here. Further, if the defendant had pleaded such a plea, where the object was to avoid such a probate altogether, we do not say it would have been a bad plea.

In 1 *Wms. Saund.* 275, n. (3), and *Williams on Executors*, vol. 1, p. 267, the plea of *ne unques executor* and *ne unques administrator*, were both put on the same footing in that respect. It was said that the defendant may either give evidence of *bona notabilia* on that plea, or plead specially. In this case, however, there is no doubt that the plea is perfectly good.

Judgment for the Defendant (b).

(a) 5 B. & C. 491.

(b) Reported by Leofric Temple, Esq.

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THOMAS v. THOMAS.

February 7, 15.

[In the Exchequer of Pleas.

Coram Parke, B., and Rolfe, B. (a).]

ASSUMPSIT for money had and received.

Plea, the general issue.

Upon the trial before *Rolfe, B.*, at the Herefordshire Summer Assizes, 1849, it appeared that the plaintiff and defendant became entitled to real property under a will as tenants in common. Upon the death of the testator, the defendant had entered into possession of the whole of the premises and received all the rents; but the plaintiff, having subsequently discovered his right, claimed a moiety of the rents so received, and brought this action to enforce his claim. It was contended at the trial that the action did not lie by one tenant in common against his co-tenant; but the learned Judge refused to nonsuit the plaintiff, and, a verdict having been found for him, leave was given to the defendant to move for a nonsuit.

An action for money had and received by one tenant in common against his co-tenant for receiving more than his portion of the rents, will not lie. The remedy is by action of account, under 4 Ann. c. 16, s. 27.

Keating having in Michaelmas Term last obtained a rule accordingly,

Whateley and *W. H. Cooke* shewed cause. The question is, whether one tenant in common can sue his co-tenant for his share of the rents, in an action for money had and received; or whether he must declare under the statute of Anne (b), in an action of account. There is no doubt that the latter action is maintainable, but that circumstance cannot debar him from maintaining also an action for money had and received. In 1 *Archbold's Nisi Prius*, 197, it is said, "that this action of account is now ob-

(a) *Pollock, C. B.*, and *Alderson, B.*, had left the Court.

(b) 4 Ann. c. 16, s. 27.

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solete, and that assumpsit or debt is substituted for it. At common law the action of account did not lie for one tenant in common against his co-tenant, unless the latter had taken all the profits of the land. The 4 Ann. c. 16, s. 27, was passed to alter that state of the law and to enable one tenant in common to sue his co-tenant in an action of account. It will be said, that that act would not have been passed if any remedy existed before; but it is nowhere laid down that money had and received will not lie. In *Comyn's Digest*, tit. "*Accompt*," (A. 4), it is said that "*Accompt* lies against one as receiver, who is appointed to receive the rents or debts of another." "So, if he receives them without direction." The action of account did not lie at common law by one tenant in common against his co-tenant, unless he had been appointed his bailiff; *Wheeler v. Horne* (a). In *Vin. Abr.* tit. "*Account*," (A), pl. 12 n., a case of *Hammond v. Ward* is cited: "which was error to reverse a judgment in an insimul computaverunt, and assigned that the action was brought against him for rent as tenant of the land, and not as receiver, and, therefore, account did not lie; but *Rolle*, C. J., said, it appears here that the action is brought against the defendant as receiver, and if one receives my rents without my consent, I may have either debt or account against him; and affirmed the judgment." In *Goodtitle v. Tombs* (b), it was held that one tenant in common could recover against another in ejectment by default, and that trespass for mesne profits would lie. [They also cited 1 *Sel. N. P.* 2; 2 *Inst.* 379; *Bro. Abr.* tit. "*Accompt*," pl. 20—35; *Bac. Abr.* tit. "*Account*," (C); *Wilkin v. Wilkin* (c); *Tomkins v. Will-shear* (d); *Baxter v. Hozier* (e); *Cottam v. Partridge* (f); and *Sturton v. Richardson* (g).]

(a) Willes, 208.

115.

(b) 3 Wils. 118.

(e) 5 Bing. N. C. 288; S. C.

(c) 1 Salk. 9; S. C. 1 Show. 71; Comberbach, 149. *Midgley v. Lovelace*, Carth. 289.

7 Scott, 233.

(f) 4 M. & G. 271; S. C. 9 Dowl. 629.

(d) 5 Taunt. 431; S. C. *nom.* *Tomkins v. Wiltshire*, 1 Marsh.

(g) 13 M. & W. 17; S. C. 2 D. & L. 182.

Keating and *Skinner*, in support of the rule. Before the Statute of Anne one tenant in common could not sue his co-tenant. "Although one tenant in common or joyn-tenant, without being made bayliff, take the whole profits, no action of account lieth against him" (a). The statute of Anne has given that form of action, and that form only. In *Cruise's Dig.* tit. 20, "*Tenancy in Common*," sect. 9, it is said, "By the old law, tenants in common had no remedy against each other for the rents of the estate (b): but by the statute 4 Ann. c. 16, s. 27, actions of account are maintainable by tenants in common against each other in the same manner as by joint tenants." [He also referred to *Com. Dig.* tit. "*Estates*," (K. 8).] And there seems to be a good reason why an action for money had and received should not lie, for there is no privity between the co-tenants. In an action of account deductions might be made, which would not be allowed in money had and received; and it might be that half of the receipts were liable to various payments. Besides, if this form of action were maintainable, the title to land might be tried under it, which cannot be. In *Eason v. Henderson* (c), it was decided that a tenant in common, who occupies and takes the whole produce derived from the culture of the common property, the whole expense of which is sustained by himself, but receives no rent or any other profit in respect of the property, is liable to account to his co-tenant under 4 Ann. c. 16. [*Clarence v. Marshall* (d) was referred to.] [*Parke*, B.—I am strongly inclined to think that this form of action will not lie. He referred to 11 Mod. 92, (e).]

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Cur. adv. vult.

PARKE, B., now delivered judgment. (After stating the

(a) Co. Litt. 200, b.

B. 69.

(b) Sect. 9, p. 409, 4th ed.

(d) 2 C. & M. 495.

(c) Q. B., Mich. Vac. 1848,
cited from 18 Law Journ., Q.

(e) See 11 Mod. 187.

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facts of the case, his Lordship said):—The question is whether an action for money had and received will lie by one tenant in common against his co-tenant, for his moiety of the rents. The authorities were cited on both sides during the argument.

It is quite clear to us, upon reference to *Co. Litt.* 200, that by the common law, no action for money had and received could be maintained by one tenant in common against the other for his moiety of the rents. Several cases are there put in which one tenant in common can bring an action against his co-tenant. But it is also seen there, that if there are two tenants in common of chattel, and one of them takes it away, the other has a remedy by action, except the chattel be destroyed, but that he may retake it. Several other instances of the same kind are put, to point out these distinctions; and it is laid down, that no action of account will lie at common law by one tenant in common against his co-tenant, for taking more than his share of the profits, unless he had first appointed him his bailiff to receive them. This state of the law was remedied by 4 Ann. c. 16, s. 27, which gave an action of account by one tenant in common against the other, considering him as bailiff, for receiving more than his share. But then the defendant is entitled to all the rights and immunities of a receiver, and may shew that the money has been lost without his fault, whereas in an action for money had and received to the use of another, the defendant is liable for the money absolutely. It is clear that the statute of Ann. gives only an action of account, in which the receiver would be entitled to all just allowances: and, this action for money had and received will not lie.

A question occurred to me when considering this case viz., whether this action might not lie, on the principle that where there are tenants in common of a reversion or as of a reversion of land let on lease, they may either join in their action for the rent, or bring several actions

For if a tenant in common can either join or sever, and if by severing he could recover a sum, nominatim, equal to his moiety of the rent, there might be some ground for saying that the other could sue him for half of the whole amount if he wrongfully received it. But Lord *Holt* explains that in *Medgley v. Lovelace* (a), and *Martin v. Crompe* (b). He says, that where one tenant in common severs, he cannot recover half the sum nominatim, but only a moiety of the rent; thus shewing that the rent continues unsevered. The law is clear on that subject.

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It appears, therefore, quite clear to us, that the case of a tenant in common who receives the whole of the rent due to himself and his co-tenant, is the same as where he takes possession of a chattel, in which case neither trespass nor trover will lie. The plaintiff's only remedy, therefore, is by an action of account. This rule must, therefore, be made absolute.

Rule absolute (c).

(a) Carth. 289.

(b) 1 Ld. Raym. 340.

(c) Reported by Leofric Temple,
Esq.

OVERTON and Another v. HARVEY.

February 15.

[In the Common Pleas.

Coram Maule, J., Cresswell, J., and Williams, J.]

ASSUMPSIT (writ dated 9th of January, 1849) by indorsees against acceptor of a bill of exchange for 575*l.*, dated the 19th of June, 1847, drawn by Robert Remmett To a count upon a bill of exchange, the defendant pleaded, by way of estoppel, that the plaintiffs had, before this action, declared against the defendant in terms identical with those of the present declaration, that the defendant had pleaded thereto an agreement by the plaintiffs to give him time; that the plaintiffs replied de injuriâ, and that the defendant obtained judgment: and the plea averred the identity of the causes of action in the present and former action. Replication: that the plaintiffs gave the defendant the time mentioned, and that that time had elapsed before the commencement of the suit. Held, upon demurrer, that the plea was good, and the replication bad. Held also, that although the whole record in the former action was set forth in the plea, the Court could not inquire into the validity of the judgment in that action.

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on, and accepted by, the defendant, payable to the order of the said R. Remmett three months after date, indorsed by the said R. Remmett to Owen Parry, and by him to the plaintiffs. There was also a count upon an account stated.

The defendant pleaded, by way of estoppel, that before the commencement of this suit, and after the said bill became due, and after the making of the said promises in the said declaration mentioned, (to wit), on the 2nd of October, 1847, the plaintiffs impleaded the defendant in an action on promises in the Court of Common Pleas. The plea then set out a declaration similar in terms to the present declaration; and stated that the defendant pleaded to the last count of that declaration, non assumpsit; and to the first count, that after the said acceptance and indorsements of the said bill, and whilst the said plaintiffs were the holders, and before the same became due, to wit, on the 19th day of June, A.D. 1847, it was agreed by and between the plaintiffs and the defendant, that in consideration that the defendant would, in the event of the said bill of exchange being dishonoured by the defendant when the same should become due and payable, give and duly execute to the plaintiffs his warrant of attorney for the amount of the said bill, and also for all charges and expenses relating to the said warrant of attorney, to be paid on the 25th day of December, A.D. 1848, with interest, and would also allow judgment to be then immediately entered on such warrant of attorney and registered, they, the said plaintiffs, would then accept such warrant of attorney from the defendant, and would not issue any execution thereon until the 25th of December, 1848, and would not enforce the said bill as against the said defendant, but would extend the time for payment of the same until the day and year last aforesaid; that the said bill became due and payable on the 22nd day of September then last past, and was then dishonoured by the defendant; that when the said bill became due and payable, to wit, on, &c., the defendant, in pursuance of the agreement was, and from thence until th—

, &c.; and was also then, and from thence until the
g of the said last mentioned plea, had been and then
s ready and willing, and then offered to allow judg-
o be then immediately entered on such warrant of
y, and registered; of all which premises the plaintiffs,
on the day and year last aforesaid, had due notice,
re then requested by the defendant to accept such
of attorney as aforesaid, and to extend the time for
it of the said bill until the said 25th of December,
yet that the plaintiffs did not nor would accept the
rrant of attorney, but wholly refused so to do, and
njustly and in violation of the said agreement,
to enforce payment of the said bill by the defendant;
defendant then, in and by the said last mentioned
ferred and alleged that he was ready to verify the
The plea then stated that the plaintiff had replied
iâ in the former action, and that the cause had been
verdict found, and judgment given for the defendant,
e record, &c. (a) The plea then averred the identity
bill, account stated, and causes of action in the
action, with the bill, account stated, and causes of
n the former action, concluding with a verification
said record, and the usual prayer of judgment in
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ication to so much of the plea as related to the first
that the plaintiffs ought not to be barred, &c.,
the plaintiffs say that they, the plaintiffs, did
the time, and did give the defendant time for

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mencement of this suit, sought to enforce the payment of the said bill, and the amount of the said bill is still unpaid to the plaintiffs. That the said 25th of December, 1848, had elapsed long before the commencement of this suit, and that the defendant has not at any time hitherto given or executed to the plaintiffs any warrant of attorney for the amount of the said bill, or any part thereof, or otherwise howsoever. Verification and prayer of judgment.

As to the said second count, the plaintiffs entered a nolle prosequi.

Special demurrer to the replication, and joinder.

C. W. Wood (*Manning*, Serjt., with him), in support of the demurrer. The replication is bad. It is repugnant and contradictory: for while admitting that the former action was brought for the same cause of action, that the defendant had judgment, and that that judgment stands unreversed—facts which shew that the plaintiffs did endeavour to enforce payment of the bill, and that they did not give the defendant time—it nevertheless avers, in direct contradiction of those facts, that the plaintiffs did give the defendant time, and did not seek to enforce payment of the bill. The plea is a good plea in bar. The cases on this subject are collected in the notes to *The Duchess of Kingston's case*, in the second volume of *Smith's Leading Cases* (a), and the general principle is thus stated: "it is submitted that the cases of *Vooght v. Winch*, and *Doe v. Huddart*, are by no means at variance with the doctrine of Lord Chief Justice *De Grey*; viz., that a judgment on the same point between the same parties is in pleading, a bar, in evidence, conclusive. And it is submitted that the true meaning of this is, that it is conclusive as a plea where there is an opportunity of pleading it, but that where there is no such opportunity, then it is conclusive as evidence." Here it has been pleaded, and it is, therefore, a bar to the action. The plea, it is true, instead of merely stating the recovery

(a) Page 444.

of the former judgment, which would have sufficed, 1 *Wms. Saund.* 91 a, n. (2), 6th ed., has stated all the proceedings in the former action; and it will perhaps be contended, that the validity of the judgment may, on that account, be now inquired into. But this, it is submitted, the Court will not do: the judgment has been pronounced by a competent authority, and if it be erroneous, it can only be set aside upon a writ of error. In *Holmes v. Walsh* (a), the defendant, who had been convicted upon an indictment for falsely swearing to a debt under a commission of bankruptcy, was sued by the assignees of the bankrupt, upon the 5 Geo. 2, c. 30, s. 29, for double the amount of the alleged debt; and, upon demurrer to the declaration, it was contended, "that the judgment of conviction on which the action was founded, was erroneous on the face of it, and could not, therefore, be the foundation of any action." Lord *Kenyon*, in giving judgment, said, "if the judgment be improper, it can only be reversed by a writ of error;" and *Lawrence*, J., observed, "the judgment on the indictment must be taken to be good until it is reversed by a writ of error." So, here, the Court will not look into the pleadings in the original action to see whether the judgment be good. The only question is, not whether the judgment recovered be unimpeachable, but whether it be standing and unreversed.

Peacock, contra. The plea is bad. The present action was commenced on the 9th of January, 1849, and the plea only shews that the plaintiffs had agreed to forbear suing until the 25th of December, 1848. [*Maule*, J.—One of the allegations in the plea is, that the promises and causes of action in this and the former action are the same. An action is brought upon certain promises and causes of action, to which the defendant pleads something in bar,

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and upon that plea gets judgment that he go without day; is not that a sufficient bar to another action upon the same promises and causes of action?] It is apprehended it is not. Suppose, for instance, that to a special count for goods sold and delivered, the defendant pleads that the goods were sold at two months' credit, and that that time had not elapsed before action brought, and that upon that plea judgment is given for the defendant, surely that judgment could not be well pleaded in bar to another action for the same matter commenced after the expiration of the credit. [*Maule, J.*—No: and if it was pleaded, the proper replication would be, that the new action was not brought for the same cause of action as the old one. *Cresswell, J.*—In the case put, the plaintiff declares for the price of goods payable on request: the defendant pleads non assumpsit, and he obtains judgment, because he never entered into the contract alleged in the declaration. When an action is brought at the expiration of the credit, the cause of action is not the same: the very ground of the decision in the first case is, that the plaintiff had no cause of action.] The cause of action in the present case is not the same as in the first action: the bill upon which the action is brought is the same, but the breach in respect of which the first action was brought was non-payment on a certain day on which the Court decided it was not payable, while the breach in the present case is non-payment before the commencement of this action. [*Maule, J.*—Then no judgment can ever be pleaded in bar in any case. *Cresswell, J.*—The action is brought not for not paying on a particular day, but for not performing the promise contained in the bill of exchange.] If this judgment be a bar, the plaintiffs can never recover, though it is clear that the debt is due to them. A judgment recovered by a defendant only operates by way of estoppel; that is, the plaintiff is precluded from alleging any facts contrary to those alleged in the first action.—The plaintiffs here do not seek to do that; they admit

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all that the first judgment precludes them from denying, viz., that they had no right to sue before the 25th of December, 1848. Suppose they had not brought an action before that day, could the agreement which they had entered into not to do so, be pleaded in bar to an action brought by them after that day? And if not, why should their bringing an action before that day, to which the agreement was a bar, affect their right to sue after the day? [Cresswell, J.—Are they suing for the same cause of action as that for which they sued before?] No. [Cresswell, J.—Then why did they not traverse that averment?] The question is rather for the Court than for a jury. [Maule, J.—It would be clearly for the jury.] It sufficiently appears upon the record that the cause of action is not the same, for the breach is different. [Cresswell, J.—The cause of action is the breach of the promise, and the promise is to pay at maturity.] The Court did not by the first judgment decide that the plaintiffs had no right of action against the defendant, but only that the action was not then maintainable. Suppose a man brought an action as executor, and he failed, because it turned out at the trial that he was an administrator and not an executor, would the judgment in that action be a bar to another action in which he sued as administrator? [Cresswell, J.—There the action is brought by a different person: in the first, the declaration alleges that the defendant did not pay to the executor; in the second, that he did not pay to the administrator.] In *Robinson's case* (a), the executors of J. Robinson brought an action of debt on a bond, and the defendant having pleaded by way of estoppel, that before the purchase of the writ one of the plaintiffs had sued him upon the same bond as administrator, and had recovered judgment, the plaintiffs in reply alleged the repeal of the letters of administration, and that they were executors; to which replication the defendant demurred, and judgment was given for the plaintiffs;

(a) 5 Rep. 32 b.

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“for it was agreed, that by the former judgment the plaintiff was barred as to the action of the writ, scil., to have an action as administrator. But although he then in truth was executor, yet the mistaking of his action is no bar nor estoppel to bring his true action; as if an heir brings a formedon in the discender, and be barred therein, yet he may have a formedon in the remainder, or reverter.”

MAULE, J. (a)—It appears to me that this plea is good, and the replication bad. The declaration is on a bill of exchange, in the ordinary form, and there is a plea stating in effect, that the plaintiff brought a former action for the same promises and causes of action, in which action judgment was recovered by the defendant. It goes unnecessarily probably, into details of the grounds upon which the judgment was given; and it is entirely owing to that, that the question here arises. But I think that, whatever may have been the grounds of the judgment, we must take it to have been a judgment recovered for the same cause of action. There is no incongruity in holding, and it is in fact by no means impossible that the former action was for the same cause of action as the present one. It is averred in the plea, in express terms, to be so; and as it is not denied, it must be taken to be so. We have, therefore, the judgment of a competent Court, that the defendant go without day in respect of this very cause of action. Then, are we to try whether the Court was right in giving this judgment? We cannot do so. If it be wrong, it can only be reversed by a Court of error. The plaintiffs do not deny that judgment was given in the former action for the defendant; and whatever were the circumstances under which it was given, we must take it that the plaintiffs ought never to have brought the former action at all, nor this one, unless they were prepared to shew that it was for a distinct and different cause of action.

(a) *Wilde, C. J., was sitting at Nisi Prius.*

CRESSWELL, J.—I am of the same opinion. The plaintiffs having sued before, failed in their action, and judgment passed for the defendant. Looking at the present declaration alone, it would seem that this action was for the same cause of action. Then the plea sets out the former judgment, and avers it was for the same cause of action. This is not denied by the plaintiffs, and I do not see that the cause of action in the present action must be distinct from that in the former one. The case in *Coke's Reports* (a) was different. There, it appeared that the causes of action could not have been the same; and that being so, there was no occasion for a traverse of the allegation, that they were the same. Here, however, the cause of action not only may have been, but, as far as one can judge from the whole record, probably was the same in both actions.

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WILLIAMS, J.—I am of the same opinion. The causes of action were either the same, or they were different. If they were the same, the judgment is a bar: if different, the obvious course was open to the plaintiffs of traversing the averment that they were the same (b).

Judgment for the Defendant.

(a) 5 Rep. 32 b.

(b) *Talfourd*, J., was absent.

E A S T E R T E R M,

IN THE THIRTEENTH YEAR OF THE REIGN OF VICTORIA

*April 19.*HAWKINS *v.* AKRILL.

[In the Common Pleas.

*Coram Wilde, C. J., Cresswell, J., Williams, J., and
Talfourd, J.]*

When a Judge at Chambers dismisses a summons upon the ground of the insufficiency of the affidavits in support of it, the party applying cannot, in renewing his application to the Court, use fresh affidavits.

LUSH moved for a rule, calling upon the plaintiff to shew cause why the judgment, and all subsequent proceedings in this action, should not be set aside for irregularity.

It appeared that an application for the same purpose had been made, on the 12th of April, 1850, to *Maule, J.* at Chambers, who, after adjourning the summons to the 15th, dismissed it on that day, upon the ground that the defendant's affidavit did not deny with sufficient distinctness that he had been served with the declaration, or with notice of its having been filed. The rule was now moved upon a fresh affidavit of the defendant, which denied those facts with the requisite particularity.

WILDE, C. J.—Is not this in effect an application upon the same facts and for the same object as before the Judge but with amended affidavits?

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Lush. The Court of Exchequer, in *Pike v. Davis* (a), held, that an application which had been refused upon the merits at Chambers might nevertheless be renewed to the Court, and that fresh affidavits might be read upon making such renewed application. [*Williams, J.*—In 2 *Chit. Archb.* 1444, 8th ed., it is said: “In the Court of Exchequer it would seem that the application to the Court may be strengthened by additional affidavits. But this is otherwise in the other Courts.”] This Court, in *Peterson v. Davis* (b), held, that an application to enter a suggestion to deprive the plaintiff of costs might be made to the Court after a previous application for the same purpose to a Judge at Chambers, and that amended affidavits might be used. “The question before us now,” said *Wilde, C. J.*, “is, whether it is competent to the defendant, after such a decision at Chambers, to come to the Court to ask for the same thing, either upon the same, or upon a new or amended, state of facts.” “The quantity of business transacted at Chambers is so vast, that there is little time for deliberation: and it would be very inconvenient to the suitors, and very hard upon the Judge, if parties were to be conclusively bound by an opinion expressed there. We therefore think it but right and consonant with justice that an unsuccessful application at Chambers should not be held to preclude the party from moving the Court upon the same, or upon additional materials.” [*Wilde, C. J.*—I doubt much whether I ever used the language there attributed to me; but, if I did, it had reference only to matters of law, not to matters of fact. *Cresswell, J.*—In *Peterson v. Davis*, the facts existed, but they were not discussed before the Judge. Here the Judge has said that on one side there is an allegation that the declaration was served, and that there is no sufficient denial of that on the other; the applicant comes now to make a sufficient denial before us.]

(a) 6 M. & W. 547; S. C. 8 Dowl. 387.

(b) 6 C. B. 235, 245; S. C. 6 D. & L. 79.

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WILDE, C. J.—Undoubtedly a case of great hardship is shewn, and the Court is inclined to go as far as possible to entertain the application. But this seems to be only a re-agitation of precisely the same question as that which was before the Judge at Chambers; and that cannot be done.

CRESSWELL, J., concurred.

WILLIAMS, J.—This is nothing more than an application to rescind an order of *Maule*, J., upon fresh materials.

TALFOURD, J., concurred.

Rule refused.

April 19.

The BIRKENHEAD, LANCASHIRE, and CHESHIRE JUNCTION RAILWAY COMPANY v. COTESWORTH and Others.

[In the Exchequer of Pleas.

Coram *Pollock, C. B., Parke, B., Rolfe, B., and Platt, B.*]

The form of declaration given by sect. 26 of 8 & 9 Vict. c. 16, (the Companies' Clauses Consolidation Act), is not applicable to an action against the executors of a shareholder for calls made during his lifetime.

DEBT for calls. The declaration was in the form prescribed by 8. & 9 Vict. c. 16, s. 26, (the Companies' Clauses Consolidation Act). Pleas. First, never indebted; secondly, that the defendants "were not nor are, the holders of the said shares modo et formâ."

At the trial before *Cresswell*, J., at the last Spring Assizes, held at Chester, the following facts appeared. A person of the name of Gilfillan, was the registered holder of the shares, and two calls were made in respect of them in February and August, 1849. He died subsequently to the

latter date and appointed Cotesworth and two others his executors; but Cotesworth only proved the will, power being reserved to the two others to come in and prove afterwards. It was contended, on the part of the defendants, that they could not be sued as executors in this form. The learned Judge was of opinion that the action would not lie and nonsuited the plaintiff, reserving leave to him to move to set aside the nonsuit and enter a verdict for him.

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Welsby now moved accordingly. The question is, whether the general form of declaration given by the 26th section of 8 & 9 Vict. c. 16, is applicable to a case where executors are sued for calls which became due in the lifetime of their testator. In considering this question, the whole of the statute must be taken together, and it must not be decided on the construction of one particular section. Section 26 enacts, that "in any action or suit to be brought by the company against any shareholder to recover any money due for any call it shall not be necessary to set forth the special matter, but it shall be sufficient for the company to declare that the defendant is the holder of one share or more in the company (stating the number of shares), and is indebted to the company in the sum of money to which the calls in arrear shall amount, in respect of one call or more upon one share or more (stating the number and amount of each of such calls), whereby an action hath accrued to the company by virtue of this and the special act." It may be said that that section does not apply to a case like the present; but if it is taken in conjunction with the 21st section it will be found to be applicable. That section enacts, that "the several persons who have subscribed any money towards the undertaking, or their legal representatives respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the company, at such times and

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places as shall be appointed by the company; and with respect to the provisions herein or in the special act contained for enforcing the payment of calls, the word 'shareholder' shall extend to and include the legal personal representatives of such shareholder." [*Parke, B.*—You must also look at the 27th section, which enacts, that "on the trial or hearing of such action or suit it shall be sufficient to prove that the defendant at the time of making such call was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given as is directed by this or the special act," &c. The defendants are liable solely as executors on these pleadings. There is no statement that they are sued as executors.] If that be necessary, no effect whatever is given to the 21st section. [*Parke, B.*—It has no application to the case of a call made in the lifetime of the testator. According to your argument there might be two shareholders of the same share at the same time. For if you bring an action in the lifetime of the testator, he is the shareholder, and if, after his death, you bring an action against his executor, he is the shareholder also, which appears absurd.]

POLLOCK, C. B.—For the reasons given during the argument, I think there ought to be no rule, and that the nonsuit was right.

PARKE, B.—I am of the same opinion. It is impossible to contend that the defendants were the shareholders at the time when the calls were made. So that the 26th section under which this declaration is framed, is altogether inapplicable to the present case. Then as to the 21st section, I think that the words "legal representatives" in that section, applies only to executors who are liable for calls upon shares which are in their possession. At all events, it does not mean that the testator and his executors are to be

shareholders of the same share at the same time. I think that this form of declaration is wrong, and that the action is not maintainable.

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ROLFE, B., and PLATT, B., concurred.

Rule refused.

The DUKE OF BRUNSWICK v. SLOMAN and Others.

April 20.

[In the Common Pleas.

Coram *Wilde, C. J., Cresswell, J., Williams, J., and
Talfourd, J.*]

HENNIKER moved for a rule to shew cause why the affidavit, filed in this cause on the 17th of November, 1849, by Miles, one of the defendants, should not be taken off the file. Final judgment had been signed on the 21st of July, 1849, and Miles had been taken in execution in the following November, upon which he obtained a rule nisi for his discharge from custody, upon the ground that he had been arrested against good faith. The rule was granted upon the affidavit, which was the subject of the present motion; but was afterwards discharged upon the ground that the jurat of the affidavit was defective. The present application was made upon the grounds that the affidavit contained statements prejudicial to the character of the plaintiff, and that, as the affidavit had been decided to be a nullity, it ought not to be suffered to remain on the file. The affidavit in support of the rule did not, however, aver that the statements objected to, were scandalous or irrelevant.

The Court will not order an affidavit which is not shewn to be scandalous or irrelevant, to be taken off the file merely because it cannot, upon some technical ground, such as a defect in the jurat, be read in the cause in which it is filed.

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WILDE, C. J.—No sufficient reason is shewn for doing that which is asked. It does not appear that the affidavit contains anything scandalous or irrelevant to the motion, in support of which it was made; and the objection, that it is inadmissible upon some technical ground, such as a defect in the jurat, is no reason for taking it off the file.

The rest of the Court concurred.

Rule refused.



April 25.

SPEAR v. WARD.

[In the Common Pleas.

Coram *Wilde, C. J., Cresswell, J., Williams, J., and Talfourd, J.*]

Where a rule for a new trial upon payment of costs is granted, a rule to rescind that rule, upon the ground that the costs have not been paid, is, in the Common Pleas, a rule nisi only in the first instance.

IN this case the plaintiff had obtained a verdict for 95*l.*, but the Court, on the 23rd of January last, made a rule absolute for a new trial upon payment of costs. The plaintiff's costs were taxed on the 22nd of February at 116*l.*; and in the following month of April the clerk of the plaintiff's attorney demanded that amount of the attorney of the defendant, who refused to pay it.

Channell, Serjt., now moved, upon an affidavit stating the above facts, that the rule of the 23rd of January might be discharged. The only question is, whether the rule now applied for should be a rule nisi, or a rule absolute in the first instance. The authorities are conflicting. In *Champion v. Griffiths* (a), a rule absolute was granted in

(a) 1 Dowl. 319, N. S.

the first instance; while in *Solly v. Langford* (a) a rule nisi only was given. [*Williams, J.*—In 2 *Chit. Archb. Pr.* 1346, 8th ed., it is said, a rule for this purpose is absolute in the first instance in the Queen's Bench. In the Exchequer it is a rule nisi, which makes itself absolute, if cause be not shewn in a limited time. In the Common Pleas *it seems* to be a rule nisi. *Wilde, C. J.*—This rule can only be a rule nisi.]

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PER CURIAM.

Rule nisi.

(a) 2 D. & L. 250; 13 M. & W. 151.

SIMPKINS v. POTHECARY.

April 25.

[In the Exchequer of Pleas.

Coram *Pollock, C. B., Parke, B., Rolfe, B., and Platt, B.*]

THE declaration stated that the defendant was summoned "to answer the plaintiff in an action of debt, and the plaintiff demands of the defendant the sum of 236*l.* 10*s.*, which he owes to and unjustly detains from him." For that, whereas the defendant on, &c., made his draft or order in writing for the payment of money, called a banker's cheque, and directed the same to the Manager of the Southampton Branch of the National Provincial Bank of England, and thereby required the said manager, &c., to pay to the plaintiff or bearer 76*l.* 10*s.*, and then delivered the same to the plaintiff, who still is the bearer thereof; and the said manager did not pay the said cheque,

Debt lies against the drawer of a banker's cheque by the payee to whom it has been delivered by the drawer. A declaration stating that the defendant was summoned to answer the plaintiff in an action of debt, contained a count on a cheque, alleging that the defendant, in consideration

of the premises, *promised* the plaintiff to pay him the amount of the said draft or order on request, and contained also counts for goods sold and delivered, and on an account stated. The declaration concluded with the general breach, "Whereby and by reason of the non-payment of the said several moneys, an action hath accrued," &c. On motion in arrest of judgment, *Held*, a good declaration in debt, as the allegation of a *promise* to pay the cheque might be rejected as surplusage.

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although the same was then presented to him, whereof the defendant then had due notice; and the defendant then, in consideration of the premises, *promised the plaintiff to pay him* the amount of the said draft on request. And whereas the defendant afterwards, to wit, on, &c., was indebted to the plaintiff in 80*l.* for goods sold and delivered; and in 80*l.* for money due on an account stated; which said last mentioned several moneys were to be paid on request: whereby, and by reason of the non-payment of the said several moneys, an action hath accrued to the plaintiff to demand and have of and from the defendant the said several moneys respectively, making together the said sum above demanded; yet the defendant has not paid the said sum above demanded, or any part thereof, to the plaintiff's damage, &c. Pleas, first to the first count, that the defendant did not make the cheque, and secondly, to the residue of the declaration, never indebted.

At the trial a general verdict was entered for the plaintiff. A rule nisi having been afterwards obtained to arrest the judgment,

J. S. Douglas shewed cause. There are two questions; first, whether debt will lie on a banker's cheque, such as that described in the first count; and secondly, whether that is a count in debt or assumpsit. As to the first point; where there is a privity of contract between the parties debt will lie. This applies to bills of exchange; and a cheque on a banker is in effect an inland bill of exchange, payable to the order of the drawer, and must, therefore, be governed by the same rules. Assuming that this is so, *Watkins v. Wake* (a), and *Stratton v. Hill* (b), are authorities to shew that debt will lie. In the former case, which was an action by indorsee against his immediate indorser, *Parke, B.*, said, "I have also no doubt that debt is maintainable in this case, by reason of the privity

(a) 7 M. & W. 488, 490; S. C. 9 Dowl. 242.

(b) 3 Price, 253.

between the parties." In *Hatch v. Traves* (a) it was held, that debt might be maintained on a promissory note by payee against the maker, though it did not express that it was for value received, or for any consideration; so on a bill of exchange, by the drawer, being also payee, against the acceptor. The fact of one party giving a cheque to another is an admission of a debt, and shews a privity between them; therefore, an action of debt will lie.

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As to the second point; this is a good count in debt, and there is, therefore, no misjoinder. There is a good breach in debt in the general conclusion of the declaration. In *Cloves v. Williams* (b), which was an action of debt, it was held, that a count alleging that the defendant accepted a bill, and promised to pay the amount, whereby an action had accrued to the plaintiff to demand the amount, was a good count in debt. And that case was recognised in *Compton v. Taylor* (c). In *Brill v. Neele* (d), and *Dalton v. Smith* (e), there was no good breach in debt, and those cases only establish that a declaration in debt is not good with a breach in assumpsit. But here there is a good breach in debt, and the allegation of a promise may be rejected as surplusage, "utile per inutile non vitiatur." If the allegation of the promise were struck out, this would still be a good count; *Esdaile v. Maclean* (f).

Barstow, in support of the rule. The allegation of a promise in the first count shews that it is a count in assumpsit, whereas the other counts are in debt. The cases of *Brill v. Neele*, and *Dalton v. Smith*, decide that the statement of a promise is a material allegation, and not surplusage; therefore the declaration is bad, unless the Court decide that a count in assumpsit may be

(a) 11 A. & E. 702.

(d) 3 B. & A. 208; S. C. 1

(b) 3 Bing. N. C. 868; S. C. Chit. 619.

5 Scott, 68.

(e) 2 Smith, 618.

(c) 4 M. & W. 138; S. C. 6
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(f) 15 M. & W. 277, 282.

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joined with a count in debt. In *Smith v. Cox* (a) it was decided that, in assumpsit by the indorsee against the drawer of a bill of exchange, if no promise to pay is alleged, the count is bad on special demurrer.

PARKE, B.—This declaration is good as a declaration in debt, if the allegation of a promise to pay may be rejected as surplusage. I think it may be so rejected, and that *Cloves v. Williams* (b) is an authority for so doing. It is true that in that case there was an amendment, and, therefore, it is not entitled to so much consideration as if it had been the formal decision of the Court. But the same may be said of *Brill v. Neele* (c), in which *Tindal*, C. J., then counsel in the case, applied for leave to amend, upon the intimation that the case of *Dalton v. Smith* (d) was a decision against him. Now *Dalton v. Smith* was not in point, there being no averment in the declaration in that case that the defendant was indebted at all. In *Brill v. Neele* there was such an averment, so that there must have been some mistake in applying for leave to amend. The cases of *Cloves v. Williams* and *Compton v. Taylor* (e) are in point in this case, and are sufficient authorities. Then, with respect to the other and principal objection, viz. that there is no privity between the parties, it appears that the plaintiff received this cheque from the defendant, which establishes a privity between them, and, therefore, an action of debt in the present instance is maintainable.

POLLOCK, C. B., ROLFE, B. and PLATT, B. concurred.

Rule discharged.

(a) 11 M. & W. 475; S. C.
2 Dowl. 1035, N. S.
(b) 3 Bing. N. C. 868.

(c) 3 B. & A. 208.
(d) 2 Smith, 618.
(e) 4 M. & W. 138.

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MARSH *v.* HIGGINS and Another.

April 17, 23,
25.

[In the Common Pleas.

Coram *Wilde, C. J., Cresswell, J., Williams, J., and
Talfourd, J.*]

ASSUMPSIT (writ issued the 2nd of July, 1849) by indorsee against the acceptors of a bill of exchange for 387*l.* 18*s.* 2*d.*, dated the 7th of June, 1847, payable four months after date, drawn by Pitt and Maybury upon, and accepted by defendants, and indorsed by P. and M. to the plaintiff.

Third plea (dated the 1st of November, 1849), that before the commencement of this suit, to wit, on the 1st of November, 1847, by an indenture then made between the defendants of the first part, Charles Groves and Joseph Fry of the second part, and the several other persons creditors of, or claimants for damages against the said defendants, who should subscribe and affix their names and seals, or otherwise assent to the said indenture of the third part, the defendants assigned to C. G. and J. F., their estate and effects upon certain trusts for the payment in the first instance and in a certain manner, of certain persons having certain claims against the defendants, and afterwards for the payment of the general creditors *pari passu*; and the creditors covenanted with the defendants not to sue them in respect of any of their debts, and that if they should do so, the deed might be pleaded as a release in bar of all such

The 224th section of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), enacts, that every deed of arrangement entered into by a trader with six-sevenths of his creditors, shall be binding on all his creditors; and the 225th provides, that no such deed shall be binding on any non-executing creditor, "until after the expiration of three" ("calendar," see sect. 276) "months from the time at which such creditor *shall have had notice from such trader*" of the deed.

To a declaration upon a bill of exchange, the

defendants pleaded in bar of the whole action that after the bill became due, a deed of arrangement was entered into between them and six-sevenths of their creditors, under the 224th section; that the plaintiff, to wit, on the 1st of November, 1847, had notice from them of the deed, and that three months elapsed from the notice before the commencement of the suit.

Held, upon motion for judgment *non obstante veredicto*, that the plea was bad, for not stating that the notice was given after the act came into operation.

Quære, whether it was not also bad for not stating that such notice had been given three calendar months, &c.

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actions. The plea then averred that the said deed was a deed of arrangement within the meaning of the provisions of the 12 & 13 Vict. c. 106, with respect to arrangements by deed; that at the time of making and entering into it the defendants were traders within that act; that the deed was signed by more than six-sevenths, to wit, by twelve-thirteenths in number and value of those creditors whose debts amounted to 10*l.* and upwards, accounting every creditor a creditor in value in respect of such amount only as upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from the defendant or either of them would appear to be the balance due to him; that at the time of making and entering into the said deed, the plaintiff was a creditor of the defendants in respect of the bill in the declaration mentioned, and was a creditor of the defendants within the meaning of the provisions of the 12 & 13 Vict. c. 106, with respect to arrangements by deed; and the said creditors, so being more than six-sevenths, were also at the time of making, &c. the said deed more than six-sevenths, within the meaning of the said provisions with respect to arrangements by deed, in number and value of those creditors of the defendants whose debts amounted to 10*l.* and upwards, accounting every creditor, &c.; that the said indenture was a deed of arrangement within the provisions of the said act respecting arrangements by deed; that before and at the time of making, &c. the said deed, the defendants suspended payment, and the plaintiff, to wit, on the 1st of November, 1847, had notice from the defendants of such suspension and of the said deed; that after the bill became due, three months from the time at which the plaintiff had notice from defendants of their said suspension of payment and of the said deed, expired before the commencement of this suit, and (the said deed having been at all times from the making, &c. and being still, in force) the said deed then became and continued effectual and obligatory in all respects on the said creditors by whom it was signed as aforesaid, and upon the plaintiff as such creditor of

the defendants, and as effectual and obligatory in all respects upon and against the plaintiff as if he had executed the same; and that the trustees in the said deed named accepted the said trusts thereof and acted in performance of the same. That by reason of the premises, the defendants, before the commencement of this suit, became and were released from the claim and demands of their said creditors by whom the said deed was so signed as aforesaid, and from the debts and causes of action in the introductory part of this plea mentioned. Verification.

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Replication, that the plaintiff had not notice from the defendants of their said suspension of payment and of the said deed modo et formâ, concluding to the country. Issue thereon.

Upon the trial before *Wilde*, C. J., at the sittings after Hilary Term last, in London, the jury found a verdict for the defendants upon this issue.

Keating, on a former day in this Term, obtained a rule nisi for judgment non obstante veredicto, upon the grounds, first, that the plea did not shew that the notice of the execution of the deed of arrangement was given subsequently to the passing of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106); and secondly, it did not state that three calendar months' notice was given as required by the act.

Byles, Serjt. and *Aspland* now shewed cause. First, it is not necessary that the notice should have been given since the passing of the act. The 6 Geo. 4, c. 16, s. 4, provided that if a composition deed was executed with certain formalities, and certain requisites were complied with, it should be a valid instrument and not an act of bankruptcy; and a creditor who refused to come into the arrangement was left to his remedy against the person of his debtor, or against any property which the latter might afterwards acquire. By the 224th section of the recent act, however, it is provided that every such deed "now or

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hereafter entered into"—evidently referring to deeds executed before the passing of the act as well as to those executed after—"and signed by or on behalf of six-sevenths in number and value of those creditors whose debts amount to 10*l*. and upwards," shall be as binding upon creditors who have not executed it, (subject to certain conditions,) as upon those who have. And then the 225th section, upon which the present question turns, enacts, that the deed shall not be binding upon a non-executing creditor "until after the expiration of three months from the time at which such creditor *shall have had* notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader *shall within such time* obtain from the Court an order or certificate of the said Court declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid; and it shall be lawful for the Court within the district of which the trader shall have resided or carried on business for six months next immediately preceding his suspension of payment to make such order or certificate on the petition of any such trader, and to exercise jurisdiction in and over the matters of any such application; and no creditor who *shall not have had* fourteen days' notice of any intended application for such order or certificate as aforesaid shall be bound thereby." It will be observed, that the Legislature, when speaking in this section of that which can only be done after the passing of the act,—even though it be of one of two events which precede the other in point of time, as where it speaks of the debtor obtaining the certificate, which must be got before the deed is binding—uses the future tense and not the future perfect; and it may therefore be inferred that when it employs the latter tense it intends the enactment to have a retrospective operation. [*Cresswell, J.*—Is there any provision in the act for giving a dividend to the creditors who do not execute?] No; but there seems to be no object for confining the enactment to notices

given after the passing of the act. Its object is rather to make that binding, which before the passing of the act was not binding. [*Wilde, C. J.*—The general purview of the act seems to be that the creditor shall have an option of assenting to the composition if he pleases; but the construction contended for gives him none. Suppose that the composition deed had been entered into five years ago, that the estate had been wound up under it, and that the debtor was now in possession of ample means to pay those creditors who did not come into the arrangement: was it the intention of the Legislature that they should now be bound by that deed?] Many of the provisions of the act are very beneficial to creditors; and therefore, the strict grammatical construction now contended for may be the less reluctantly adopted. It is also to be observed that this act contains no clause—as all former bankrupt acts did—that it shall be construed beneficially for creditors; and the Court will therefore be guided simply by the natural meaning of the words. [*Wilde, C. J.*—I do not wonder at the omission, for the Judges always said they could not understand the meaning of that clause.]

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It may be contended that the act does not apply to this case, because it was not passed until after the action had been commenced: but there are several authorities against that view. In *Towler v. Chatterton* (a), it was held that Lord *Tenterden's* Act, (9 Geo. 4, c. 14),—which enacts, that no acknowledgment of a promise to pay a debt shall prevent the operation of the Statute of Limitations unless such acknowledgment or promise shall be in writing,—precluded a plaintiff from recovering a debt upon an oral promise for its payment made a year before the passing of the act. It is true, that in that case, the action was not commenced until after the act had come into operation; but the same construction was adopted in *Hilliard v. Lenard* (b), where the action had been commenced before the passing of the

(a) 6 Bing. 258; S. C. 3 M. & P. 619.

(b) M. & M. 297.

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act. So, in *Freeman v. Moyes* (a), it was held, that executors who had commenced an action in Easter Term, 1832, were liable to costs under the 31st section of the 3 & 4 Wm. 4, c. 42, which did not come into operation until the 1st of June, 1833. The cases upon this subject are collected in *Moon v. Durden* (b). [*Doe d. Payne v. The Bristol and Exeter Railway Company* (c), was also referred to.] [*Cresswell, J.*—Ought you not to have pleaded puis darrein continuance?] This may be considered as, in effect, such a plea. It is not a formal plea of puis darrein continuance, but that is an objection which should have been taken by special demurrer. It prays a wrong judgment, it is true; but after pleading over, and after verdict, the Court will give such judgment as upon the whole record it thinks is the right judgment; *Allen v. Hopkins* (d); *Cobbett v. Grey* (e); *Gibbons v. Vouillon* (f). Further, the Court can see from the record, that three months must have expired since the act came into operation, (for more than three months expired before the trial took place); and as the judgment of the Court must be given upon the whole record, it is submitted that they cannot, with that fact appearing upon it, give judgment upon it for the plaintiff. In *Charnley v. Winstanley* (g), which was an action against a husband and wife for non-performance by the latter of an award, although the Court held that the plaintiff could not recover for the breach assigned, because the marriage was a countermand of the authority of the arbitrator, they nevertheless refused to arrest the judgment; because, finding upon the record a statement of the marriage by which the female defendant had put it out of her power to perform the award, they saw that she had broken the covenant to abide by the award. [They referred also to *Le Bret v. Papillon* (h).]

(a) 1 A. & E. 338; S. C. 3 N. & M. 883.

(b) 2 Exch. 22.

(c) 6 M. & W. 320; per Parke, B. 339.

(d) 13 M. & W. 94.

(e) Exch., Mich. Term, 1849.

(f) Com. Pleas, Mich. Term, 1849.

(g) 5 East, 266.

(h) 4 East, 502.

Secondly. The three months mentioned in the plea must be understood to mean calendar months. The interpretation clause (sect. 276), enacts, that the word "month" shall mean "calendar month;" and as the plea follows the language of the act, it may be read by the light of that clause (a). Next, the plea states that the plaintiff had notice on the 1st of November, 1847; and although that date is laid under a videlicet, the videlicet will be rejected in order to support the plea; *Ryalls v. The Queen* (b). Further, the word "month" is an ambiguous term, meaning either a lunar or a calendar month; *Lang v. Gale* (c); *Cockell v. Gray* (d); *Titus v. Lady Preston* (e). [*Williams, J.*, referred to *Simpson v. Margitson* (f).] And even if it meant, when the plea was pleaded, a lunar month, it acquired the meaning of a calendar month after the plaintiff had pleaded over; *Hobson v. Middleton* (g). Lastly, the jury have found that the plaintiff had three calendar months' notice; for that was involved in the issue taken by the replication, and the Judge will be presumed to have told the jury that the notice was a three calendar months' notice.

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Keating and *Winston*, in support of the rule. The 6 Geo. 4, c. 16, s. 4, did not affect the rights of a non-assenting creditor further than by declaring that a composition deed should, under certain circumstances, not be deemed an act of bankruptcy. The 224th section, therefore, has introduced a very important change in the position of a creditor whose debtor has entered into a composition deed. That section sweeps away all his rights in every case where the debtor has compounded to the satisfaction of six-sevenths of those who have claims upon him, however unfair the terms of that composition may be to the other seventh; and

(a) See however *Parker v. Gill*, 5 D. & L. 21.

(b) Exch. Ch. Error from Q. B., Hil. Vac. 1849. See *Nash v. Brown*, 6 D. & L. 329.

(c) 1 M. & S. 111.

(d) 3 B. & B. 186; S. C. 6 Moore, 483.

(e) 1 Stra. 652.

(f) 11 Q. B. 23. See *Parker v. Gill*, 5 D. & L. 21.

(g) 6 B. & C. 295.

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the Court will not willingly give such an enactment a retrospective effect. Besides, taking the view least favourable to the plaintiff, the 225th section is ambiguous, and there are numerous authorities which establish that nothing but very clear and unambiguous language will make an act retrospective. *Moon v. Durden* (a), and *Hitchcock v. Way* (b), are strong instances of the disinclination of the Courts to give an ex post facto operation to an act which interferes with a previously vested right. Even if it had been shewn that the language of the 225th section was ambiguous, the Court would not give it the construction contended for on the other side. But it is submitted, that the language is not ambiguous, but is clearly prospective only. It is true that the words, "shall have had," in the beginning of the section, may or may not be retrospective, and the Legislature might properly use them whether their intention was to refer to the past or to the future; but the same words are again used at the end of the same section—"and no creditor who shall not have had fourteen days' notice," &c.—in a sense necessarily prospective only, (because the power of granting a certificate is given for the first time by the act), and the same sense, it will be presumed, attaches to them in the earlier part of the section. The plea, therefore, is bad, because it merely states that three months had elapsed between the giving of the notice and the commencement of the suit, and not,—what the act requires in order to give validity to the deed,—that three months elapsed between the giving of a notice after the passing of the act and the commencement of the suit. Further, the Court, looking at the whole record, will see that at the time when the plea was pleaded, (1st of November, 1849), three months could not have expired from the date of a notice given after the act came into operation, viz., the 11th of October, 1849.

With respect to the meaning of the word "month," all the cases cited on the other side, are cases where the word occurred in mercantile or other contracts; and there, it is

(a) 2 Exch. 22.

(b) 6 A. & E. 943; S. C. 2 N. & P. 72.

not disputed, the word may be construed as either a lunar or a calendar month, according to the intention of the parties. But here the word is found in a plea, and there is no authority shewing that in that case the Court can give it any other than its ordinary legal meaning. The effect of a verdict need not be considered here, because the replication did not raise the question whether there had been a three months' notice, but only traversed the averment in the plea, that the plaintiff, to wit, on the 1st of November, 1847, had had notice from the defendants of the deed. As to rejecting the *videlicet*, it is obvious that it was introduced for the very purpose of preventing the defendants from being tied down to the time as laid under it; and if notice had been proved to have been given on a different day, the plaintiff could hardly have insisted at the trial that the variance was fatal.

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WILDE, C. J.—The Court is placed in great difficulty by this act of Parliament, and we are by no means enabled to come to a satisfactory conclusion on many parts of it. But in construing any act of Parliament we must adopt the general principle of legislation and of law, that acts are not to have a retrospective operation, unless that effect be given them by express language. It undoubtedly often happens that the Legislature considers it necessary to give acts that operation to a limited extent; but the extent to which it is given is expressed in clear language. This act, for instance, was intended to be retrospective to the extent of making valid certain deeds made before it was passed. It is, however, contended, that it is retrospective in another respect, and in a respect, too, quite inconsistent with the ordinary course of legislation and of legal experience, viz.: by attributing to it the effect of taking away an action well commenced on a vested right. Now, considering how many legal minds, in both houses of Parliament, were applied to this act, it must have been well known to the Legislature, that distinct language was neces-

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sary to give it a retrospective operation. We have given the act great attention, with the view of finding whether a retrospective meaning, to the extent contended for, can be found in it; but we are unable to find any such meaning. Certain expressions were relied upon as shewing that it necessarily had that effect; but we find that these same words were used where they clearly could have only a prospective meaning. Therefore, without occupying time in going into an examination of the various provisions of the act, it is sufficient to say that acts of Parliament are not to be construed as retrospective, except where the Legislature has clearly expressed an intention that they shall have that effect; and, adopting that general and well known principle of construction, I think that this action was well brought at the time when it was commenced, and that there is nothing in the act to take away that vested right.

CRESSWELL, J.—I am entirely of the same opinion. At the time when the action was brought, the plaintiff had a right to maintain it, and the defendants, who rely on the statute, must make out that it takes away that right. If they leave the matter ambiguous, they must fail; for it is for them to make out that the act has that meaning. I am by no means satisfied that the statute has that meaning: it may be so, but I cannot see that it is so; and construing the act according to the general rule, I should say that its operation is prospective only. Undoubtedly the words at the commencement of the 225th section are capable of a retrospective operation, but the same words are again introduced at the end of the same section, where they can only be prospective. Two or three instances were cited, on shewing cause, where statutes have been held to have a retrospective effect, and to take away a vested right. No doubt such cases have occurred,—whether intentionally or not, it is not for us to inquire,—but in all of them the words were clear. One of the instances cited was a case under the 9 Geo. 4, c. 14, commonly called Lord *Tenterden's* Act, which was passed

for relieving parties from difficulties arising from the principle that new verbal promises were supposed to revive old debts. The language, however, of that statute is, that “no acknowledgment or promise by words only *shall be deemed sufficient evidence* of a new or continuing contract.” Now, the time for deciding what is and what is not evidence of a new contract, is when the trial of the cause takes place; and when the act told the Judge what was, and what was not evidence at that time, he could not avoid deciding in obedience to it. I think, therefore, that as the defendants have failed to satisfy us that the statute should have a retrospective operation, our judgment must be for the plaintiff.

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WILLIAMS, J.—I am of the same opinion. The general rule of construction is, that a new law shall be applied to future, and not to past transactions. That rule prevents a retrospective operation being given to a statute, except where an intention that it shall have that operation is clearly expressed. I can find no such intention expressed here, and, I therefore think, that the enactment must be construed as prospective only.

TALFOURD, J.—I am of the same opinion. The general rule of construction is not denied; and its application seems perfectly clear. The words of the act are that the deed shall not be binding “until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader shall *within such time* obtain from the Court an order or certificate,” &c. Now, the “such time” within which the order is to be obtained must obviously be a time after the passing of the act, and, therefore, the three months from the expiration of which the deed is to be binding, must be three months after the passing of the act. It was suggested, that the Court would, upon looking at the whole record, see that

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three months had elapsed after the passing of the act, and would give judgment accordingly. But that is a misconstruction of the rule, that the Court is to give judgment upon the whole record; the meaning of it is, that the Court will give judgment upon the pleadings as they are, and not as they might possibly have been. The question is, whether this is a good plea: in my opinion, it is not, and therefore, I think, that this rule should be made absolute.

Rule absolute to enter judgment for the
Plaintiff, non obstante veredicto.

April 26. GOULD v. The STAFFORDSHIRE POTTERIES WATERWORKS
COMPANY.

[In the Exchequer of Pleas.

Coram Pollock, C. B., Parke, B., Rolfe, B., and Platt, B.]

An award made under the Lands' Clauses Consolidation Act (8 & 9 Vict. c. 18), is valid, although the costs are not settled in the award itself, but by a separate and subsequent instrument.

Sect. 34 directs that the costs are

to be "settled by the arbitrators," not mentioning the umpire. *Held*, that where the award is made by the umpire, he is the proper person to settle the costs.

Held also, that the settlement of the costs is good, although such instrument is not made and published till more than three months after the matter was referred to arbitration.

Held also, that an averment that the umpire "was required by the plaintiff to settle and determine the costs to be paid by the defendants to the plaintiff, under the Lands' Clauses Consolidation Act," sufficiently imports that the umpire had authority to settle the costs under sect. 34.

DEBT upon an award made under the Lands Clauses' Consolidation Act, (8 & 9 Vict. c. 18.) The declaration,—after stating that the defendants required certain lands of the plaintiff for the purpose of their railway; that the defendants offered the plaintiff the sum of 359*l.* 3*s.* 11½*d.* as compensation; that they came to no agreement; that two arbitrators were duly appointed under the act to settle and determine the amount of purchase money to be paid by the defendants; and that the said arbitrators, before they entered upon the matters referred to them, duly nominated

and appointed one Richard Sutton Ford to be umpire, to decide on any such matters on which they should differ,—alleged that “afterwards and within three calendar months after the expiration of the said enlarged time, and within three months after it devolved upon the said Richard Sutton Ford as aforesaid to determine the said matters referred, to wit, on the 13th day of February, 1849, he the said Richard Sutton Ford took upon himself the burthen of the said umpirage, and deliberately and having heard, examined, and considered the allegations, witnesses and evidences of both the said parties concerning the premises, within the said three months as aforesaid, to wit, on the day and year last aforesaid, made and published his award in writing, under his hand and seal, bearing date, to wit, the day and year last aforesaid, between the said parties, of and concerning the premises, in manner and form following, that is to say,” &c. The declaration then stated the award, which found the amount of the purchase money, to be paid by the defendants to the plaintiff, to be 820*l.*; and then averred “that the said sum of 359*l.* 3*s.* 11½*d.* was and is a much smaller sum than the said sum so awarded to the plaintiff as aforesaid; whereof the said Richard Sutton Ford afterwards, to wit, on the 23rd of June, 1849, had notice, and was then required by the plaintiff to settle and determine the costs to be paid by the defendants to him the plaintiff, under and by virtue of the said Lands Clauses’ Consolidation Act, 1845; and thereupon the said Richard Sutton Ford, to wit, on the day and year last aforesaid, by an instrument in writing under his hand and seal, bearing date, to wit, the day and year aforesaid, duly settled the costs of the plaintiff of the said arbitration, and thereby ascertained and settled the same to be, and they in fact were, the sum of 260*l.*, and did thereby direct the same to be paid by the defendants to the plaintiff; which said award, and which said last-mentioned instrument in writing were afterwards, to wit, on the day and year last aforesaid, duly delivered by the said

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umpire to the defendants, and they then had notice thereof," &c. Breach non payment of the sums awarded. To the damage, &c.

Special demurrer and joinder.

Watson, (*Willes* with him) in support of the demurrer. This demurrer raises the question, how costs are to be determined in cases of arbitration, under the Lands Clauses' Consolidation Act, (8 & 9 Vict. c. 18,) where the sum awarded by the arbitrator is larger than the sum claimed by the plaintiff. The first objection is, that the arbitrator ought to have found as to the costs upon the face of the award; for after its publication he is functus officio, and the separate instrument is void. This question depends upon the true construction of the act. The 23rd section provides that if the compensation claimed or offered exceeds 50*l.*, the party claiming may signify, by notice in writing to the promoters of the undertaking, his desire to have the question settled by arbitration. Sect. 25, provides for the appointment of an arbitrator by each party; and sect. 27 enacts, that "where more than one arbitrator shall have been appointed such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an umpire to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special act." It is observable that no form of submission to arbitration is given. Sect. 34 directs how the costs are to be settled and borne, enacting, that "all the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions." The right to costs depends on whether the sum awarded is larger or

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smaller than the sum tendered, and the question in the present case is, whether they can be settled and awarded by a separate instrument. It is submitted that they cannot. [*Platt*, B.—The submission here is only of the amount of compensation; in an ordinary submission the costs are mentioned. Does not the umpire act under two separate authorities, one, the agreement of the parties, the other, the act of Parliament? *Parke*, B.—He has only to decide the value of the land.] In *Quick v. The London and North Western Railway Company* (a) it was decided by *Erle*, J., that the provisions of the 34th section imposed on arbitrators the duty of ascertaining whether the right to costs arises, and of including it in their award when it exists. In *Morgan v. Smith* (b) it was held, that where, by an order of reference at nisi prius, the costs of the reference were to be in the discretion of the arbitrator, who should ascertain the same, he was bound to ascertain and determine the costs of the reference. So here, by the 34th section, the costs are to be “settled” by the arbitrator. After the award is once made it cannot be re-opened to settle the costs; they must be found in the usual way as part of the original award.

Secondly, even supposing the Court should hold that the costs may be determined by a separate instrument the umpire is not to decide the amount of costs. By section 27, the umpire is only to decide on such matters on which the arbitrators differ; so that if there were three questions to be settled, and only one on which the arbitrators differed, the umpire is to decide on that alone. Here it does not appear that the arbitrators did differ as to the costs. [*Pollock*, C. B.—Sect. 34 says only, that the costs are to be settled by the “arbitrators;” is not that to be read “arbitrators or umpire?” It must mean that the costs are to be settled by the person who arbitrates.] The umpire is expressly mentioned in

(a) 5 D. & L. 685.

(b) 9 M. & W. 427; S. C. 1 Dowl. 617, N. S.

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other parts of the act, as in ss. 32 and 33. It is as easy for the arbitrators to assess the costs as the umpire.

Thirdly, the award was not made within three months after the appointment of the arbitrators, inasmuch as the declaration does not allege that the instrument awarding costs was made within three months. Sect. 23 enacts, that "if when the matter shall have been referred to arbitration, the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made, the question of such compensation, shall be settled by the verdict of a jury."

A fourth objection is, that the averment in the declaration that the umpire was "required by the plaintiff to settle and determine the costs to be paid by the defendants to the plaintiff, under and by virtue of the said Lands Clauses' Consolidation Act," does not import a proper submission, or that he took upon himself the burthen as arbitrator.

Martin, (*Welsby* with him), in support of the declaration, was stopped by the Court.

POLLOCK, C. B.—I am of opinion that the plaintiff is entitled to judgment. The third point is, that the award was not made within three months after the appointment of the arbitrator; but the decision of the umpire as relates to the costs is no part of the award, it merely creates a debt which becomes due when the costs are settled. The fourth point fails for the same reason. As to the first objection, I may observe, that it is inconsistent with the second; for if the costs ought to be settled by the award itself the second objection could not arise: but I think neither tenable. The result of the 34th section is, that costs are no part of the award but are only to be *settled* by the arbitrator; his only duty, quoad the award, was to decide the amount of compensation. The costs

depend upon the rules laid down in the 34th section, the amount of them only being determined by the person who makes the award. It is true that the decision of *The London and North Western Railway Company v. Quick* (a), is contrary to this view; but the rule was there properly discharged, it being better that the question should be discussed in an action brought to enforce the award than on motion. As to the second point, I think that the word "arbitrators" in the 34th section, includes the umpire, so that the costs are to be settled by that person who makes the award; and referring to the interpretation clause, section 3, which enacts, that "unless there be something either in the subject or context repugnant to such construction;" "words importing the singular number only shall include the plural number, and words importing the plural number only shall include the singular number;"—the word "arbitrators" may mean arbitrator or umpire, or two or more arbitrators. The act, however, clearly means that the same person who made the award shall settle the costs. It is, I think, perfectly plain, that the umpire who made this award is to determine the amount of the costs; and that amount is to depend on whether the award of compensation is for the same or a less sum than was offered by the promoters of the undertaking. The sum so offered forms no element at all in the award of the arbitrators or umpire; but when the amount of compensation has been awarded, it then appears by comparing it with the sum offered, which party is entitled to costs. If the sum offered by the promoters was the same or a greater sum than that awarded, then each party pays his own costs; but if not, then the person who has made the award is to settle the costs; that is, he is to tax the amount of the costs: and when that settlement has been made, the promoters are to bear the costs of the reference so settled by the person who made the award.

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(a) 5 D. & L. 685.

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PARKE, B.—I am of the same opinion. I think all four objections are untenable. As to the first and most important,—that the arbitrator or umpire ought to include the taxation of costs in his award,—the reason why in an ordinary arbitration all must be included in the award is, that all is referred to the arbitrator by the agreement of the parties; but here, the only question is, did the Legislature mean that all done by the arbitrator or umpire should be included in one award? I think it clear that the Legislature did not intend that all the matters in dispute should be referred to the arbitrators. They are, in truth, valuers, not arbitrators; they have no power to hear any evidence as to what was the amount of the previous tender, so as to form any ground of determination as to who should pay costs. As to the second point,—that the arbitrators, and not the umpire, are to settle the costs,—the rule always followed in the construction of statutes is to take the words in their grammatical sense, unless some inconvenience or incongruity would result from so doing. Now in the 34th section, when the word “arbitrators” occurs in the latter part—“the costs of the arbitrators shall be borne by the parties in equal portions”—we must read “arbitrators” as “arbitrators or umpire;” and this being so, we must read it, when it occurs in the former part of the section, in the same way. We are not bound to give so much weight to the decision of my Brother *Erle*, as if it had been a decision by the full Court; but, I confess, I think he was misled by a supposed analogy between this and the case of an ordinary award, where the powers of the arbitrator are determined by the submission of the parties.

As to the two last objections. The first is, that it does not appear that the umpire settled the costs within three months after the matter was referred to him. It is true, the statute requires the award as to the amount of compensation to be made within three months after the reference, but nothing is said about the costs being settled within that time. It was argued that delay in settling the costs

would be productive of inconvenience, but the party entitled to them can at any time call on the arbitrators or umpire to settle them. And whenever the party does call on them, they, having accepted the office of referees, must perform the whole of the trust reposed in them, and indeed might be compelled by mandamus to do so. The last objection is, that there is no sufficient averment in the declaration that the umpire was empowered to settle the costs under the powers given by the act. But it states that the umpire was required by the plaintiff to settle the costs under the act, and that he did so; and this, I think, is all that is necessary.

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ROLFE, B.—I am of the same opinion. But for the case of *Quick v. The North Western Railway Company (a)*, I should have had no doubt, for the costs are not to be taxed at all until the award is made; and by looking at the amount awarded, and other matters to which the award has no reference, the relation between the sum awarded and that originally offered is seen. In the case decided by my Brother *Erle*, it was safer to discharge the rule and leave the party to his action.

PLATT, B., concurred.

Judgment for the Plaintiff.

(a) 5 D. & L. 685.



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April 27.

POPE v. FLEMING.

[In the Exchequer of Pleas.

Coram Pollock, C. B., Rolfe, B., and Platt, B.]

The plaintiff having entered his cause for trial at the assizes, it was called on the first day as undefended. Plaintiff's witness, a clerk of defendant, being absent, the plaintiff asked that he should be called on his subpoena, which was done, but he did not appear. The plaintiff then withdrew the record, on the representation of the Judge's clerk that it might be re-entered before twelve o'clock. He accordingly offered to re-enter it before that time, but the defendant had, in the mean time, entered a ne recipiatur, and the Judge held that the record could not be entered, it

A RULE had been obtained, calling on the plaintiff to shew cause why he should not pay the defendant the costs of the day, for not proceeding to trial according to notice.

It appeared from the affidavits, that the cause was entered in the list of causes for trial before Chief Justice *Wilde*, at the last Surrey Assizes, held at Kingston. The defendant was an attorney; and it was necessary, on the part of the plaintiff, to prove a deed, the attesting witness to which had been a clerk of the defendant when the deed was prepared, and was still in his employment. This witness not appearing, and the cause having been called on as undefended, the plaintiff requested that the witness might be called on his subpoena: this was done, but he still did not appear. The plaintiff then, after ten o'clock, withdrew the record, being informed by the clerk of the Chief Justice, that he might enter it again before twelve. Before, however, it was re-entered, the defendant entered a ne recipiatur; and the Chief Justice, on application to him, held that the record could not be entered after ten o'clock, at which time the Court sat. The witness shortly afterwards arrived, and the plaintiff offered to go on with the cause then, or that it should stand last in the list; the defendant, however, declined both proposals, although it did not appear that any of his witnesses had left Kingston.

being after ten o'clock. The plaintiff offered either to try then, or that the cause should stand last on the list, if the defendant would consent; but the defendant refused to do so.

The defendant having moved for the costs of the day, *Held*, that he was not entitled to them, it being by his own default that the cause was not tried.

Willes now shewed cause. The plaintiff ought not to be made to pay the costs of the day, since it was by no fault on his part that the cause was not tried: he in fact offered to try when it was in his power, and the defendant refused. Looking at the position of the parties, it is clear why the witness did not appear until the record had been withdrawn. The record never was withdrawn, except conditionally and upon the representation that it might be entered again. In *Lear v. Smyth* (a), the plaintiff having been compelled from the absence of his witnesses to withdraw the record, the Judge, on their arrival, allowed it to be re-entered. [He was then stopped by the Court.]

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Hurlstone, in support of the rule. The record having been withdrawn by the plaintiff when it was too late to re-enter it, the defendant was not bound to consent to anything. If the witness was not present, the plaintiff should have waited till the cause was reached in its turn, instead of having it called on as undefended, and then calling the witness on his subpoena on the conjecture that he would not be there. In *Cook v. Smith* (b), a cause having been made a remanet, and the record not having been resealed, the clerk to the defendant's attorney, who was present, refused to consent to its being tried; but the Court held, that the defendant was notwithstanding entitled to the costs of the day.

POLLOCK, C. B.—I think this rule must be discharged. The real default was with the defendant. The plaintiff withdrew his record only upon the assurance of the clerk that it could be re-entered within the usual time; the learned Judge, however, thought that a ne recipiatur having been entered, the record could not be entered after the sitting of the Court. The witness having arrived, the plaintiff offered to try then, or to let the cause be placed

(a) 2 M. & Rob. 126.

(b) 1 Dowl. 861, N. S.

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at the bottom of the list. This the defendant refused,—in all probability with a view of coming here to apply for costs of the day. It was, therefore, in fact, the fault of the defendant, and not of the plaintiff, that the cause was not tried.

ROLFE, B.—I am of the same opinion. Whenever costs have been occasioned by or through the default of the plaintiff in not proceeding to try the cause after a notice has been given, and not properly countermanded, the defendant is entitled to be repaid. But here the plaintiff was ready and willing to try; the defendant, therefore, and not the plaintiff, was in default.

PLATT, B., concurred.

Rule discharged, with costs.

April 29.

REGINA v. CARTTAR (*a*).

[*Bail Court. Coram Coleridge, J.*]

The rule that a party cannot shew cause unless he takes office copies of the affidavits on which the rule has been obtained, applies equally to a rule for an attachment as to any other proceeding.

THIS was a rule nisi for an attachment against an attorney.

Badeley was about to shew cause; when

Ogle, *contra*, objected that no office copies of the affidavits in support of the rule having been taken, the party could not be heard.

Badeley submitted that a different rule applied in the case of attachments, from that which obtained in ordinary cases; and that being a remedy partly in the nature of a criminal proceeding, it would be hard if the defendant, who was sought to be rendered criminally liable, should be

(*a*) This case will be found reported on another point, *post*, and Trinity Term, May 23rd.

precluded from shewing cause against the rule, because he was unable to pay for office copies of the affidavits.

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COLERIDGE, J.—The Master informs me that there is no distinction in this respect between the case of a rule for an attachment, and for any other proceeding. The rule must, therefore, be made absolute.

Rule absolute.

NIND and Another v. WILLIAM JONES.

April 29, 30.

[*Bail Court. Coram Coleridge, J.*]

THIS was a rule for a suggestion to deprive the plaintiffs of costs under the County Courts Act (9 & 10 Vict. c. 95, s. 129.)

The rule was drawn up “on reading the affidavit of William Jones, of No. 13, Lower Belgrave Place, Pimlico, in the county of Middlesex, plumber,” which stated “that this action was brought to recover the sum of 8*l.* 10*s.*, and a small sum for interest due on a bill of exchange accepted by this deponent for 12*l.* That the bill was presented when it became due at the house of this deponent in Lower Belgrave Place aforesaid, and that the said bill was not then paid. And deponent saith, that this cause was tried before the sheriff of Middlesex on a writ of trial, on Thursday the eighteenth day of the present month of April, when the plaintiffs recovered a verdict for the sum of 8*l.* 11*s.* 6*d.*, and no more. And this deponent further saith, that at the time of the commence-

The affidavit in support of a suggestion to deprive the plaintiff of costs under the County Courts' Act, was made by a party of the same Christian and surname as the defendant, and stated the necessary facts to bring the case within the 128th section; but it no where expressly stated that the deponent was the defendant in the action: *Held* sufficient, if a person of ordinary sense, reading it candidly,

could not doubt that they were one and the same person.

The affidavit in support of a suggestion stated “that the residence of this deponent was at the commencement of this suit, and still is, within the jurisdiction of the said County Court, and that no officer of the said County Court was or is a party to this action:” *Held* a sufficient averment that no officer was a party, at the time of the commencement of the action.

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ment of this suit he resided and dwelt, and does still reside and dwell, at No. 13, Lower Belgrave Place, Pimlico, in the County of Middlesex, and that the plaintiffs, at the time of the commencement of this suit, dwelt and carried on their trade and business of wholesale paper stainers, within twenty miles of the residence of this deponent, that is to say, in Beech Street, Barbican, in the city of London, as this deponent has been informed and verily believes. And this deponent further saith that the plaintiffs' cause of action arose at Pimlico, in the county of Middlesex aforesaid, within the jurisdiction of the Westminster County Court for Middlesex, held at No. 82, Saint Martin's Lane, Westminster, in the said county, and not elsewhere; and that the residence of this deponent was, at the commencement of this suit, and still is, within the jurisdiction of the said County Court; and that no officer of the said County Court was or is a party to this action. And this deponent further saith, that at the time of the commencement of this suit he was liable to be summoned to the said Westminster County Court for payment of the said sum so recovered as aforesaid, and that for the said cause of action a plaint might have been entered against him by the plaintiffs in the said County Court. That the said Westminster County Court for Middlesex was at the commencement of this suit, and still is, held in St. Martin's Lane aforesaid, and is a Court constituted under the 9 & 10 Vict. c. 95, and that the Judge before whom this action was tried did not certify that the same was fit to be brought in a superior Court."

C. W. Wood shewed cause. The affidavit upon which this rule is moved is defective, in not shewing that the deponent is the defendant in the cause. Admitting that an affidavit in support of a motion for a suggestion may be made by a stranger to the cause (*a*), this affidavit made by a deponent

(*a*) See *Walker v. Furnell*, *ante*, p. 127.

of the same name, but not described as the defendant in the cause, does not bring the case within the provisions of the statute; as it does not shew that the defendant resided within the jurisdiction of the Court, or within twenty miles of the plaintiff. Another objection is, that the affidavit does not shew that neither the defendant nor the plaintiffs was or were an officer or officers of the Court, at the time of the commencement of the action; but only states "that no officer of the said County Court was or is a party to this action." In *Dodd v. Wigley* (a), the words were, "that neither the said plaintiff nor the defendant is an officer," &c., "nor was any officer of the said County Court a party, directly or indirectly, concerned in the matters;" and the Court held, that that averment was insufficient for not shewing that the defendant was not, at the commencement of the suit, an officer. The language of Mr. Justice *Cresswell*, in that case (b), is strongly in favour of the present construction. The case of *Meeten v. Nicholls* (c) shews, that it is necessary that the party seeking to avail himself of the 129th section should make out a clear affirmative case, by distinctly negating the exceptions in the 128th section. This has not been done here; and as the object of such a motion is to deprive the plaintiffs of the benefit of the statute of Gloucester, a strict compliance with the language of the statute should be required.

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Fish, in support of the rule. [*Coleridge*, J.—What do you say to the second objection, that it is not stated that no officer was, "at the time of the commencement of the suit," a party, &c. ?] It is submitted that the deponent might be indicted on this affidavit, if he was an officer at the

(a) 6 D. & L. 558; S. C. 7 C. B. 106.

(b) *C. W. Wood* referred to a report of the case in 18 Law Journ., C. P. 117, where the language attributed to that learned

Judge was more in his favour than in the other reports. *Fish*, contra, relied on the report in 7 C. B. 106.

(c) 5 C. B. 848; S. C. 5 D. & L. 799.

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time of the commencement of the suit. [*Coleridge, J.*—Is not the word “was” satisfied, if at any time before the date of the affidavit he was not an officer?] It is submitted that the reasonable construction of the whole affidavit is, that the word “was” refers to the commencement of the suit. As to the first objection, the contents of the affidavit sufficiently shew, in the absence of any affidavit to the contrary from the other side, that the deponent and the defendant are one and the same person. It states, “that at the time of the commencement of this suit he was liable to be summoned to the said Westminster County Court for payment of the said sum so recovered as aforesaid, and that for the said cause of action a plaint might have been entered against him by the plaintiff in the said County Court.” To construe the defendant and the deponent to be different persons, would be to adopt a construction contrary to the natural meaning of the language. An affidavit in support of a motion for a suggestion is not to be construed like a pleading attacked on special demurrer; for the plaintiff is not concluded by the rule being granted, but may traverse the suggestion.

Cur. adv. vult.

On the following day,

COLERIDGE, J., delivered judgment.—On shewing cause, in this case, against a rule for entering a suggestion to deprive the plaintiffs of costs under the County Courts’ Act, certain defects in the affidavit, on which the rule was moved, were relied on.

The first objection was, that it is not stated in express terms that the party making it, is the defendant in the suit. He is of the same Christian and surname; but it does not conclusively appear from reading the whole, that the facts therein stated and relied on as bringing the case within the 128th section of the act, apply to the defendant in the suit. It is certainly possible, consistently with all the allegations, that there may be two persons of the name of

William Jones, both parties to the same bill; that the action may have been brought against one, the drawer; and the affidavit made by the other, the acceptor. It has been decided that the affidavit for entering a suggestion need not be so precisely framed, as, if true, to prove conclusively the right to enter it. If it satisfies clearly the 128th section, it makes a sufficient *prima facie* case; for the plaintiff is not concluded by it, and a defence arising on other sections may be pleaded to the suggestion. And this principle of decision seems to me properly applicable here, without encouraging looseness in the statements of such affidavits. No one of ordinary sense, reading this affidavit candidly, could doubt that the defendant and the deponent were the same persons; and if they be not, the plaintiffs will have the benefit of that when the suggestion is entered.

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The second objection was, that it did not sufficiently appear that neither the defendant nor the plaintiffs was or were, "at the commencement of the suit," an officer or officers of the County Court, or that at that time, no officer of that Court was a party to it; and *Dodd v. Wigley*, reported in three places (*a*), was cited. I wished to look at the reports, as they were stated to vary; but it appears to me that that case is clearly distinguishable on the facts from the present case. Here, if we read the allegation, "no officer of the said County Court was or is a party to this action," with that which immediately precedes it, and is part of the same sentence, it is quite clear that the word "was" refers to the commencement of the action.

Rule absolute.

(a) 6 D. & L. 558; 7 C. B. 106; 18 Law Journ., C. P. 117.



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April 19, 30.

In re KIMPTON v. WILLEY.

[In the Common Pleas.

Coram *Wilde, C. J., Cresswell, J., Williams, J., and
Talfourd, J.*]

A prohibition will go to a County Court after the high bailiff has seized the goods of the defendant in execution upon the judgment, and while they are still in hand, *semble*.

The plaintiff entered two plaints in the County Court, one for 19*l.* 19*s.* for goods sold and delivered, work and labour, and money paid; the other for 19*l.* for money lent. The particulars annexed to the first consisted of items from Nov. 1845 to the 12th of July, 1849, amounting together to

LUSH, on a former day in this term, obtained a rule for a prohibition to restrain the Judge of the County Court of Hertfordshire from proceeding in the judgments obtained on two plaints in that Court.

It appeared from the affidavits in support of the rule, that the plaintiff, on the 28th of February last, entered two plaints in the County Court. The first was for 19*l.* 19*s.*, for goods sold and delivered, for work and labour, and for money paid; and the following were the particulars of demand annexed to it:—

| | | | £ | s. | d. |
|----------------|--|-------|---|----|----|
| 1845. Nov. 25. | Journey to Baron Dimsdale at Bird's Place, to pay 64 <i>l.</i> 14 <i>s.</i> 10 <i>d.</i> , on account of your rent | - - - | 2 | 2 | 0 |
| | Chaise hire and expenses, &c. | - | 0 | 10 | 6 |
| 1846. May | To taking an inventory of furniture, farming stock and effects, and valuing same for administration | - - | 5 | 5 | 0 |
| July 14. | Writing, copying, stationery, &c. | - | 0 | 10 | 6 |
| | Two quarters of oats | - | 2 | 14 | 6 |
| 1849. April 7. | Four quarters best white oats | - | 4 | 8 | 0 |
| | Five bushels spring tares | - | 1 | 7 | 6 |

27*l.*, which sum was reduced to the amount above mentioned by a set-off,—which, however, was not stated to have been allowed by the defendant. The particulars of the second plaint consisted of three items, from April 1846 to the 14th of July, 1849. The plaintiff recovered judgment in the first cause for 17*l.*; in the second, for 19*l.* *Held*, upon motion for a prohibition, First, that the items in the two plaints were not so connected as to form one cause of action, although they might have been recovered under one count. Secondly, that it did not appear that the County Court had exceeded its jurisdiction in trying the first plaint, as the affidavits in support of the rule for a prohibition did not shew either that the set-off had been resorted to, in the course of the trial, to reduce the plaintiff's demand, or that, if so resorted to, it was not proved that the defendant had not allowed it, or that he had refused to allow it, during the trial.

| | £ | s. | d. | L. M. & P. 1850. |
|--|----|----|----|---------------------|
| 1849. May 14. One quarter of oats - - - | 1 | 3 | 0 | |
| July 12. To a journey to Clothall to see Mr. Swaine relative to a claim you made upon him - | 2 | 2 | 0 | KIMPTON |
| Chaise hire and expenses, &c. - - - | 0 | 10 | 6 | WILLEY. |
| 1845. To very many attendances upon you, Baron | | | | |
| 1846. Dimsdale, and Mr. Mallam; also went to Mr. | | | | |
| 1847. Appleyard's, London, respecting a mistake in | | | | |
| 1848. the rent of the farm, and settling same; also | | | | |
| 1849. attending Mr. J. Biggs, the person appointed to make the valuation of growing crops at Es- sendon West End Farm, and attending him to receive the award - - - | | | | |
| Railway hire and expenses, &c. - - - | 0 | 16 | 6 | |
| | 27 | 16 | 0 | |
| 1849. Apr. 14. Cr. by balance of Mr. Pinnock's account | 8 | 5 | 3 | |
| | 19 | 10 | 9 | |
| Commission for collecting the above account - | 0 | 8 | 0 | |
| Paid receipt stamp - - - | 0 | 0 | 3 | |
| | 19 | 19 | 0 | |

The second plaint was for 19*l.* 0*s.* 8*d.* for money lent, and was accompanied by the following particulars:—

| | £ | s. | d. |
|------------------------------|----|----|----|
| 29 April, 1846. Cash - - - | 10 | 0 | 0 |
| 7 April, 1849. Cash - - - | 5 | 0 | 0 |
| 14 July, ——— Cash - - - | 2 | 0 | 0 |
| | 17 | 0 | 0 |
| Interest to Dec. 1849. - - - | 2 | 0 | 8 |
| | 19 | 0 | 8 |

The affidavit of the defendant's attorney stated "that when the first mentioned plaint was called on to be heard, he, as such attorney, objected to the hearing thereof, on the ground that the Judge of the said County Court had no jurisdiction in or over the cause, for that it appeared, on the face of the particulars annexed to the said plaint, that the demand of the plaintiff on the defendant was for

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a sum amounting to more than 20*l.*; that the deponent contended that the plaintiff had no right to set-off (as it appeared on the face of the particulars he had done, for the purpose of reducing his claim to a debt of not more than 20*l.*) a sum of 8*l.* 5*s.* 3*d.* received by him from a Mr. Pinnock to the defendant's use; and that the Judge overruled the objection, and made an order for the payment of 17*l.* 9*s.*, and 5*l.* 1*s.* costs." The same affidavit went on to allege, "that when the other plaint was called on the deponent objected to the hearing, on the ground that the plaintiff claimed on the whole from the defendant a sum amounting to upwards of 39*l.*, which was all one demand, and one cause of action, and that the plaintiff could not split his demand; but that the Judge overruled that objection also, and made an order for the payment of the amount with costs."

The defendant's affidavit stated, "that at the time when the plaints were entered, the plaintiff was indebted to the defendant in 8*l.* 5*s.* 3*d.* for money had and received from the plaintiff to the defendant's use; that the defendant never stated any account with the plaintiff, or acknowledged that any balance was due from him in respect of the subject-matter of the said summonses, plaints and proceedings, or any or either of them; and that he had not, nor, to his knowledge, had any other person on his behalf, at any time whatever, authorized, or consented to the plaintiff's setting off the said sum against the amount claimed by him in the said summons," &c., "or against the amount claimed by the plaintiff in the said summonses, plaints, suits or actions, or on any other account whatsoever."

[It also appeared that execution had been issued, and that the sub-bailiff had returned that he had taken the defendant's goods, that they had been appraised at 22*l.*, and that they were in hand.]

Hawkins now shewed cause. The application is too late. Nothing remains to be done by the County Court,

and as a prohibition is therefore useless, the Court will not grant it; *In re Poe* (a). [*Wilde*, C. J.—Is not a further order, analogous to a venditioni exponas, necessary before the execution is complete. By the rules of the County Courts the money realized by the execution is to be brought into Court, and the plaintiff is to go there for it.] The question whether prohibition lies to a County Court after execution levied, was discussed, but not decided, in *Robinson v. Lenaghan* (b), where *Hall v. Norwood* (c) was cited. [*Maule*, J.—The latter case is a distinct authority, to shew that a prohibition will not go after execution has been completed; the reason given being, that there is no person to be prohibited; and possession is never taken away or disturbed by prohibition.] In 2 Inst. 602, one of the objections of Archbishop Bancroft, to the practice of granting prohibitions, is thus stated:—"As touching the time when prohibitions are granted, it seemeth strange to us, that they are not only granted at the suit of the defendant in the Ecclesiastical Court after his answer, (whereby he affirmeth the jurisdiction of the said Court, and submitteth himself unto the same;) but also after all allegations and proofs made on both sides, when the cause is fully instructed and furnished for sentence: yea after sentence, yea, after two or three sentences given, and after execution of the said sentence or sentences, and when the party for his long continued disobedience is laid in prison," &c. To which the Judges answer, "Prohibitions by law are to be granted at any time to restrain a Court to intermeddle with, or execute anything, which by law they ought not to hold plea of, and they are much mistaken that maintain the contrary." "And the King's Courts that may award prohibitions, being informed either by the parties themselves or by any stranger, that any Court, temporal or ecclesiastical, doth hold plea of that, (whereof they have

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(a) 5 B. & Ad. 681; S. C. 2 N. & L. 713.
& M. 636. (c) 1 Sid. 165.

(b) 2 Exch. 333; S. C. 5 D.

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not jurisdiction,) may lawfully prohibit the same, as well after judgment and execution as before." *Wilde, C. J.*— I believe it is said that a prohibition will be issued after judgment, only where the matter is apparent (*a*), that is, where the want of jurisdiction appears on the record, and not where it is made to appear aliunde.] In this case the want of jurisdiction, assuming that there be any, does not appear upon the face of the plaints. [*Wilde, C. J.*— But does it not appear upon the plaint and the particulars taken together?] The particulars annexed to the first plaint shew, indeed, that 27*l.* were due to the plaintiff, but they also shew that the demand was reduced by a set-off to 19*l.* 19*s.*; and that brings the case *prima facie* within the jurisdiction of the County Court, without stating that that set-off was consented to by the defendant. And the second plaint is clearly upon the face of it and of the particulars, within the jurisdiction.

Independently, however, of this objection, there are others which are fatal upon the merits. The rule was granted upon two grounds: first, that the amount sought to be recovered by the plaints formed together but one demand, which could not be recovered in the County Court, and which the plaintiff had split for the purpose of suing in that Court; and secondly, that as the defendant had not consented to the set-off allowed in the particulars of the first plaint, that plaint was not within the jurisdiction of the County Court. As to the first point, the 63rd section of the County Courts' Act, enacts, "that it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said Courts, but any plaintiff having cause of action for more than 20*l.*, for which a plaint might be entered under this act if not for more than 20*l.*, may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding 20*l.*; and the judgment of the Court upon such plaint shall be in full

(*a*) See *Com. Dig.* tit. "*Prohibition*," (D).

discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly."

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The case of *In re Aykroyd* (a), which was cited upon moving for the rule, has not established that two or more complaints may not be brought where the whole demand might be sued for in one count; but only, that one entire demand shall not be split into several, for the purpose of proceeding in the County Court, where that demand consists of items so connected together, that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another. In *Neale v. Ellis* (b), where the question arose upon a section of the Brighton Court of Requests' Act, (3 & 4 Vict. c. x., s. 24), similar to the 63rd section of the County Courts' Act, it was held by *Coleridge, J.*, that a plaintiff, who had demands for the price of a horse, for goods sold and delivered, and for rent, was entitled, after having sued for and recovered 15*l.* for the horse by plaint in the Court of Requests, to maintain his action in the superior Court for the residue of his claim. In *Rex v. The Sheriff of Herefordshire* (c), the Court held, that the carriage of two several parcels of goods, at the interval of a month, constituted two distinct demands, for which two suits might be prosecuted in the old County Court. [*Williams, J.*—That case is hardly reconcileable with *In re Aykroyd*.] In the last-mentioned case there was in effect but one contract; the plaintiff could not have proved one case without proving all. In *Wickham v. Lee* (d), it was held, that rent in arrear, and a demand for double value for holding over after notice to quit, were separate causes of action within the 63rd section, and might, therefore, be sued for in two complaints. So in *Vines v. Arnold* (e),

(a) 1 Exch. 479; S. C. 5 D. & L. 701. cited from 18 Law Journ., Q. B. 21.

(b) 1 D. & L. 163.

(e) Com. Pleas, Mich. Vac.

(c) 1 B. & Ad. 672.

1849. This case will be reported

(d) Q. B., Trin. Vac. 1848, in 7 D. & L.

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the vendor of two distinct parcels of goods was held not to have abandoned his claim for the price of the second parcel, by having sued for the price of the first alone in the County Court. At all events, the jurisdiction of the County Court is not to be ousted by the mere assertion that the sum sued for forms part of a larger demand. The Judge must inquire into the truth of that assertion, and if he comes to the conclusion that it is not well founded, should proceed to try the cause. That is the course which was pursued in the present instance; and there is nothing upon the affidavits to shew that the decision of the Judge was erroneous.

As to the second ground upon which the prohibition was applied for,—viz., that the defendant had not consented to the set-off in the first plaint;—it is quite consistent with the affidavits, that the defendant did consent to the set-off in the course of the trial; for they, in effect, only state that the set-off had not been allowed in any account between the parties, or assented to before the trial, and that the objection was made when the cause was called on, and before the Judge proceeded to hear it. Besides, if the set-off was not assented to, the plaintiff abandoned the excess of his demand beyond the amount for which he recovered judgment; for the 63rd section enacts, that in such a case the judgment of the Court “shall be in full discharge of all demands in respect of such cause of action.” *Woodhams v. Newman* (a), therefore, which was cited in moving for the rule, has no application in the present case; for there the Court only decided that a plaintiff was not bound to reduce his claim by set-off, but might sue for the whole of it, without being deprived of his costs, if it was reduced to less than 20*l.* by a set-off. *Beswick v. Capper* (b), which was also referred to, is distinguishable.

Lush, in support of the rule. First, it is obvious, from

(a) 6 D. & L. 683.

(b) 7 C. B. 669.

the particulars in the two complaints, that the plaintiff split his cause of action for the purpose of suing in the County Court. The space of time over which the items in the second complaint run, is included in that embraced in the first; and the two particulars consist merely of separate items of one account. The Court of Exchequer have decided that the 63rd section applies to cases where "one item is connected with another in this sense, that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another, and form one entire demand;" *In re Aykroyd* (a); and tried by that test these items form but one demand. [*Wilde*, C. J.—Is it not usual to keep a cash account separate from every other?] Still the accounts may together form but one cause of action. The case of *Rex v. The Sheriff of Herefordshire* (b), has been overruled by *In re Aykroyd*. In *Wickham v. Lee* (c), it was said by *Erle*, J., that if two distinct counts were indispensable to recover the amount claimed in the superior Courts, it could not be said that the plaintiff split one cause of action by bringing two separate complaints. In that case two counts would have been necessary; here the entire amount might have been recovered under a single count (d). [*Maule*, J.—Anciently the count was the same thing as the declaration. It is only in modern times that a count has been spoken of as something different from a declaration.] Suppose a baker supplies his customer daily with bread, has he a separate cause of action for every loaf so supplied? or will baking a joint of meat give him a cause of action distinct from that which he has for the bread? In such a case all the items form together one demand, arising from his dealings in his trade with his customer. So here it appears that there

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(a) 1 Exch. 479, 493; S. C. 5 D. & L. 701.

(b) 1 B. & Ad. 672.

(c) Q. B., Trin. Vac. 1848, cited from 18 Law Journ., Q. B. 21.

(d) See 2 Wms. Saund. 121 e, n. 2, 6th ed.; *Morse v. James*, 11 M. & W. 831; *M'Gregor v. Graves*, 3 Exch. 34.

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was a long running account between the defendant and the plaintiff, as principal and agent; and there is no reason for treating the sums lent, rather than any other items in the account, as forming a distinct cause of action.

With respect to the first plaint, it clearly appears upon the face of the particulars annexed to the summons, that the plaintiff's demand exceeded 20*l.*; and as the set-off had not been assented to or allowed by the defendant, the plaintiff had no right to deduct it from his own demand, in order to reduce the latter within the amount over which the County Court has jurisdiction. [*Wilde*, C. J.—It may be that the plaintiff was prepared to prove that the defendant had agreed to the set-off, but that at the trial of the cause, the defendant did not object to the set-off. The affidavit of the defendant only shews, that he never assented to it at any time before the trial, which is consistent with his having done so in the course of it.] If the fact were so, it was competent for the plaintiff to state by affidavit that the set-off had been allowed. But he has not done so; and the positive averment in the defendant's affidavit, that he never stated any account with the plaintiff, or acknowledged that any balance was due to him, is sufficient to shew that the set-off has not, at any time, either before or during the trial, been allowed. In *Beswick v. Capper* (a), the Court granted a prohibition where the original demand exceeded 20*l.*, and there was nothing to shew that the set-off, by which it was reduced below that amount, had been allowed by the defendant. [*Maule*, J.—Does it appear what passed at the trial in that case?] No. [*Wilde*, C. J.—Here the defendant gives an account of what took place at the trial, and does not tell us that no evidence was given to shew that the set-off had been allowed. Before we grant a prohibition we must clearly see that the inferior Court has exceeded its jurisdiction.] Then *Beswick v. Capper* was wrongly decided, for it does not appear that

(a) 7 C. B. 669.

the affidavit, upon which the prohibition was granted, contained any such statement. [*Maule, J.*—Suppose the fact to be that evidence was given before the Judge that an account had been stated between the plaintiff and the defendant, ought a prohibition to go?] Even in that case it ought; for the facts now before the Court shew, that the County Court had no jurisdiction to try the plaint, and the decision of the Judge, that he had jurisdiction, cannot give it him if he really had it not; *Thompson v. Ingham and Another (a)*. Thus, if a defendant be summoned to a County Court within whose jurisdiction he does not reside, and the Judge decides that he does reside within it, he may nevertheless come to this Court, and, upon an affidavit denying that fact, obtain a prohibition.

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WILDE, C. J.—Though the discussion of this case has extended to a considerable length, the Court being anxious to see that they did not act counter to any previous decisions; yet, on looking at the whole of the case, I think that there is not any great difficulty in it. The motion is for a prohibition, on the ground that the County Court is proceeding in a case in which it has no jurisdiction. With respect to the first plaint, let us see how the case is presented to the Court. The affidavit upon which the rule was obtained, states that two separate plaints were entered in the County Court between the parties, one of which plaints was for the recovery of 19*l.* 19*s.* upon an account amounting to 27*l.* 16*s.* for goods sold and delivered, and work and labour; and the other, for the recovery of 19*l.* 0*s.* 8*d.* for money lent and advanced; which two sums together exceed the amount over which the County Court has jurisdiction. The defendant's attorney says that both the plaints were heard on a certain day, and that the deponent, from instructions received from the defendant, attended at the hearing; and, when the first case was called on, objected to the hearing, on the

(a) *Ante*, p. 216.

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ground that the Judge had no jurisdiction over the case, for that it appeared upon the face of the particulars annexed to the plaint that the demand of the plaintiff amounted to more than 20*l*.; and he contended that the plaintiff had no right to set off (as it appeared on the face of the particulars he had done, for the purpose of reducing the debt to a sum of less than 20*l*.), the sum of 8*l*. 5*s*. 3*d*., which was the amount set off; and he contended, that no account having been settled and stated between the plaintiff and the defendant, the debt or claim was for more than 20*l*., and that, therefore, the Judge of the County Court had no jurisdiction. He says that the Judge overruled the objection, and heard the plaint, and made an order on the defendant for the payment of 17*l*. 9*s*. for debt, and 5*l*. 1*s*. for costs. And then he says, that when the other plaint was called on, he objected to its being heard, because the plaintiff claimed in the whole 39*l*., which was all one demand, or one cause of action, and that, therefore, the plaintiff could not be allowed to split such demand into two. He then says that the cause was heard and an order made for the payment of the sum of 17*l*. 9*s*. The affidavit of the defendant states nothing more than that he instructed his attorney to make the objection, and that he never did state or settle any account with the plaintiff, or agree to allow the set-off.

We find, then, that in the first case the County Court gave judgment for the plaintiff for the sum of 17*l*. 9*s*. How was that debt made out and proved? Of that there is not one word in the affidavit. Was the claim reduced by any set-off? Of that there is not a syllable. The affidavits state, simply, that a certain plaint was called on for hearing; that an objection was made to its being tried; that the objection was overruled; that the cause was heard; and that judgment was given for the plaintiff for 17*l*. 9*s*. But it does not appear that that sum was part of a larger demand which was reduced by a set-off, or that any more than 17*l*. 9*s*. was proved to be due. Now, beyond all doubt, it is the duty of those who come here to move for a

prohibition to lay proper grounds before the Court for the conclusion that the inferior Court has exceeded its jurisdiction. But how can that be said to appear, when the whole result of the affidavit, as far as the actual proceedings of the Court are concerned, is an allegation that an objection was made to the hearing, and that the Court overruled it. The question was, whether the objection was one to which it was the duty of the Court to yield? That must have depended upon the evidence. It is possible that the plaintiff might have had evidence to sustain his case. He might have been prepared to prove a debt of 27*l.*, and an agreement that 8*l.* should be deducted from it, leaving the balance still due. How was the Judge to know whether it was so or not, until he had heard the case? The objection was, that he ought not to hear the cause; not that, after having heard it, the evidence shewed that the Court had no jurisdiction, and that the Judge should have abstained from giving judgment.

The case, then, stands thus: there was a plaint, and particulars of demand, in which the plaintiff claimed only to recover the sum of 19*l.* some odd shillings. That was within the act, and the Court had jurisdiction over it. Judgment was given for that amount; and it has not been shewn that the Court, in giving that judgment, in any respect exceeded its jurisdiction. So far as the judgment itself imports, it was pronounced by a Court of competent jurisdiction; and the only objection presented on the face of the affidavit was an unfounded one. It was taken prematurely, and the Judge was bound to overrule it. If, after the case had been gone into, the evidence had shewn that there was good ground for the objection, it should have been taken then; but that does not appear to have been done. The case is therefore different from *Beswick v. Capper* (a), for there it appeared that the plaintiff had been allowed to prove a demand of more than 200*l.*,

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and had been allowed to credit the defendant with 180*l.* by way of set-off, thus reducing the demand to 40*l.*, from which the plaintiff proposed to strike off 20*l.* to bring it within the jurisdiction of the Court. It therefore appeared affirmatively in that case that the Court had gone into matter out of its jurisdiction. Here there is not one fact to shew that in the course of the hearing the Court did not keep strictly within its jurisdiction. With respect to the first case, therefore, it appears that there is no ground for a prohibition.

As to the second case, it stands in a different position. It was a demand of 19*l.* 0*s.* 8*d.* for money lent; and the objection to it is, that the demand was presented as a separate and distinct demand, while it was, in truth, only a portion of a larger demand, which exceeded the amount to which the jurisdiction of the Court was limited. Now, suppose a prohibition were to go as to this plaint, what would be the ground of the prohibition? It would be, that the plaintiff ought to sue in the superior Court. What however is the amount of the debt which he seeks to recover? Nineteen pounds and eight pence. But that amount is within the jurisdiction of the County Court. Why, then, is he to be prevented from suing in that Court in the first instance? If, indeed, he were to prove at the trial a demand exceeding 20*l.*, he must either be nonsuited, or abandon the excess beyond that amount. If the latter course be adopted, it is to be recorded; for the statute expressly says, that the judgment "shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly;" so that the judgment is to state on the face of it that the party has abandoned the excess. But nothing of the sort was done here. The Court has jurisdiction to hear a demand of any amount, provided the plaintiff will consent to give up so much of his claim as will bring it within the jurisdiction. It is clear that the demand in this plaint was the only demand which existed; for the plaintiff had already recovered a judgment in that very Court; and all that was due to him beyond that was the

19*l.* 0*s.* 8*d.*, which was the only sum he could have recovered if he had brought an action in the superior Courts.

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But we are told that that demand must be considered as part of the larger demand, which was the subject-matter of the first plaint. That first plaint is for work and labour, for certain services, and for goods sold and delivered; the other is for money lent; and it is said these two demands must be considered as forming one entire demand. Why? Has any account ever been delivered in which the plaintiff put together the two in the form of one? Have the parties ever treated them as one demand? Of that there is no evidence. Are the sums lent at all connected with the sums claimed in the other plaint? By no means. The question is, can we say, in the absence of all evidence, that the parties ever intended to treat these sums as forming one entire demand, or that the several items in the two plaints form together one demand and one account? We only know that there is a demand for money lent, and a demand for work and labour; but there are no circumstances to shew that they are, or ever were intended to be, treated as one account. The objection, therefore, on the second plaint also falls to the ground, and the rule must be refused.

MAULE, J.—I am of the same opinion. The Lord Chief Justice has gone so fully into the reasons of our judgment, that I have but little to add. In the case of *Thompson v. Ingham and Another* (a), which was cited in the argument, there was a declaration in prohibition, which contained an allegation that a question of title was in issue; and the answer to that allegation was, that the Judge had decided that the question of title was not in issue. Upon demurrer to that plea, the Court held, that inasmuch as it was admitted on the record that the question of title was in issue, the Judge, in adjudicating upon the case, must have decided a question of title, which he is expressly prohibited from deciding, although he

(a) *Ante*, p. 216.

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was of opinion that he was not so deciding,—thinking that the question of title was not involved in the decision of the case before him. In that case, the record conclusively shewed that the question as to title was in issue; but here there is nothing to shew us that a question with respect to a larger sum than 20*l.* was in issue, and I am inclined to think, judging from the state of the affidavit, that in all probability it was not in issue. If it had appeared that a larger sum was in issue, and that the Judge of the County Court had decided upon the controverted question whether the debt was of a larger amount than 20*l.*,—then if the County Court has no jurisdiction in any case to inquire into demands exceeding 20*l.*, this case would have been the same as *Thompson v. Ingham and Another* (a). But I do not think that is so. I see nothing to prevent the Judge of the County Court from inquiring into a debt of more than 20*l.*; although if it turns out at the trial, either upon the plaintiff's case or upon the defendant's, that the claim is for more than 20*l.*, and that the plaintiff is splitting a demand of more than 20*l.* into two or more demands under that amount, he is put to the option of having judgment against him, or being nonsuited, or of recovering 20*l.* only, and abandoning the residue. There is, therefore, a difference with respect to the jurisdiction of the Courts, between their entertaining claims for more than 20*l.*, in which there is only an implied prohibition from giving judgment for more than that amount, arising from the enabling clauses of the 58th and 63rd sections, and their deciding questions of title contrary to the prohibitory clause of the 58th section. For these reasons, therefore, I think that the case of *Thompson v. Ingham and Another* is distinguishable from the present one. There it appeared that the Court had inquired into a matter in which it had no jurisdiction; here it does not appear that the Court inquired into any matter out of its jurisdiction. I think that on all these grounds the application has not been sustained.

(a) *Ante*, p. 216.

WILLIAMS, J.—I am of the same opinion. A prohibition ought not to go unless it clearly appears that the Court below has acted without jurisdiction; and that has not been shewn. With respect to the supposed division of the cause of action, it is enough for me to say that I am not at all satisfied that the subject of the two claims constituted one “cause of action,” within any reasonable construction of that expression in the act of Parliament. As to the set-off, it is shewn explicitly by the applicant that the sum claimed is a sum under 20*l.*, and that a premature objection was made, which was overruled.

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TALFOURD, J.—I am entirely of the same opinion. With regard to the main question, viz., whether the two demands constituted one entire claim, the case is essentially different from *In re Aykroyd* (a). There is nothing here to connect the various items together; there is nothing in them of a common character, except that they may be recovered in the same declaration, and in the same form of action. Whereas in the case of *In re Aykroyd* the plaintiff was a shopkeeper who was in the habit of supplying the defendant's workmen with goods upon the plaintiff's orders, and there was one entire system of dealing arising out of that practice; so that there was, in effect, only one demand arising out of one state of things, which does not appear in the present case.

Rule discharged.

(a) 1 Exch. 479; S. C. 5 D. & L. 701.

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April 30.

MAIS v. McNAMARA.

[In the Exchequer of Pleas.]

Coram Pollock, C. B., Rolfe, B., and Platt, B.]

The Court required a plaintiff who had taken the benefit of the Insolvent Act, and who sued as trustee for one also in insolvent circumstances, to give further security for costs, than that of the person for whose benefit he sued.

THIS was a rule to shew cause why all proceedings in this cause should not be stayed, until the plaintiff should give security for costs.

The affidavit upon which the rule was granted stated that the defendant had pleaded, that the plaintiff had petitioned the Court for relief of insolvent debtors, and that by an order of that Court his estate and effects were vested in the provisional assignee; that the plaintiff did not traverse this, but replied that he never had any title or interest in the goods except as trustee of one Jabez Millard; that the plaintiff was discharged under the Insolvent Act, on 9th of July, 1849, and that by his schedule it appeared that he was indebted to creditors in the sum of 2,300*l.*, and that the only assets were some good and some doubtful debts; that it appeared by the plaintiff's balance sheet that he was bankrupt in September, 1841, that his debts then amounted to 2,000*l.*, and that no dividend had been paid. The defendant had applied at Chambers to *Alderson, B.*, who on the 18th of April decided that he was entitled to security for costs, and made an order in these words: "Let the party really claiming make himself responsible for costs." A second summons was issued, and the parties again, on the 22nd April, went before *Alderson, B.*, when the defendant's attorney applied for an order for further security, on the ground that Jabez Millard, the party really claiming, was not in better circumstances than the plaintiff. His Lordship refused to alter his order otherwise than by adding the words, "by becoming the security himself." On April 20th the plaintiff joined

issue, and gave notice of trial for the second sittings in London in this Term.

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Cowling shewed cause. The only cases in which the Court has called on an insolvent plaintiff to give security for costs, have been where he sued for the benefit of his assignee. Where he sues as trustee for a third person, the Court will not interfere; *Wray v. Brown* (a). In *Perkins v. Adcock* (b), which may be relied on by the other side, although the debt for which the action was brought had been assigned to only two of the creditors, it was in trust for the benefit of all. At all events, the defendant cannot ask for any other security than that of Jabez Millard, who is the real plaintiff.

POLLOCK, C. B.—If a man has a legal right of action in himself, no question as to costs arises. If some one sues for him, that person must give security; and if the party really interested be a pauper, the Court will not take his security, but the plaintiff must give substantial security. The party for whose benefit the action is brought, ought not to be in a better position than the party in whose name he sues.

Keane, in support of the rule, was stopped by the Court.

PER CURIAM.

Rule absolute.

(a) 6 Bing. N. C. 271; S. C. 8 Scott, 557; 8 Dowl. 279.

(b) 3 D. & L. 270; S. C. 14 M. & W. 808.



May 1. The EAST LANCASHIRE RAILWAY COMPANY v. CROXTON.

[In the Exchequer of Pleas.

Coram *Pollock, C. B., Rolfe, B., and Platt, B.*]

In debt for railway calls, the declaration stated "that the defendant, at the time of the making of the calls, *was and still is*, the holder of divers, to wit, thirty-nine shares in the said company, and before the commencement of this suit, to wit, &c., *was and still is*, indebted to the said company, &c. Held, on special demurrer, that the declaration was good, although it did not follow the form given by sect. 26 of the Companies' Consolidation Act, 8 & 9 Vict. c. 16, which enacts, that it "shall be sufficient" "to declare that the defendant *is* the holder," &c., "and *is* indebted," &c.;—all except what is required by the statute being only surplusage.

DEBT for railway calls. The declaration was in the following form:—"For that the defendant, at the time of the making of the calls hereinafter mentioned, was and still is the holder of divers, to wit, thirty-nine shares in the said company, called by a certain name, to wit, quarter shares; and before the commencement of this suit, to wit, &c., was and still is indebted to the said company in a large sum, to wit, the sum of 195*l.*, parcel of the sum above demanded, in respect of two calls upon each of the said shares theretofore duly made by the said company, each of the said calls being of the sum of 2*l.* 10*s.* upon each of the said shares; whereby and by reason of the said sum of 195*l.*, parcel, &c., being and remaining wholly unpaid to the said company, an action hath accrued to the said company by virtue," &c., stating the acts of Parliament under which the railway was made, (which incorporated the Companies' Clauses Consolidation Act, 1845), and also that act.

Special demurrer and joinder.

Hugh Hill, in support of the demurrer. The declaration is bad for not following the form given by the act of Parliament. The Companies' Clauses Consolidation Act (8 & 9 Vict. c. 16, s. 26), enacts that "in any action or suit to be brought by the company against any shareholder to recover any money due for any call it shall not be neces-

sary to set forth the special matter, but it shall be sufficient for the company to declare that the defendant is the holder of one share or more in the company (stating the number of shares), and is indebted to the company in the sum of money to which the calls in arrear shall amount in respect of one call or more upon one share or more (stating the number and amount of each of such calls), whereby an action hath accrued to the company by virtue of this and the special act." And by sect. 27, it is declared that, "on the trial or hearing of such action or suit it shall be sufficient to prove that the defendant, at the time of making such call was a holder of one share or more," &c. Here the declaration alleges that the defendant, at the time of the making of the calls, "was *and still is* the holder;" so that an immaterial issue is tendered. In *The Belfast and County Down Railway Company v. Strange* (a), the declaration stated that the defendant "was and still is the holder of divers, to wit, ten shares in the said company, and, at the time of the commencement of this suit, was and still is indebted," &c. The Court there held, that the word "is," in the 26th section, meant "is at the time of calls made." As a form is given by the act of Parliament, it should be followed strictly, and the Court will not allow equivalents to be used. In *The Newport, Abergavenny, and Hereford Railway Company v. Hawes* (b), the declaration commenced by, "for that *whereas* the defendant is the holder of divers shares;" this was specially demurred to, and the plaintiff at the suggestion of the Court amended, by following the form given by the statute. So in *Moore v. The Metropolitan Sewage Manure Company* (c), the declaration omitted the words "whereby an action hath accrued to the company by virtue of this and the special act;" and Parke, B., there said, "independently of the

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(a) 1 Exch. 739, 742.

(b) 3 Exch. 476.

(c) 3 Exch. 333, 4; S. C. 6 D.
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statute it would be necessary to state all the facts specially ; but the statute, having given a general form, the defendants ought to bring themselves within its terms." The defendant elected to amend by inserting the omitted words. There is a great inconvenience in departing from the proper form.

Gray, in support of the declaration. The present form is good. This Court have held "is" to mean "was" at the time when the call was made ; all that is added, besides what is given in the statute, is surplusage. [*Rolfe*, B.—The word "is" must have some effect ; "was and still is" must mean more than "was."] In *The Midland Great Western Railway Company of Ireland v. Evans* (a), in debt for calls, the declaration stated that the defendant, "to wit, on," &c., "was and from hence, hitherto *hath been, and still is* the holder of forty shares in the said company, and then and at the time of the commencement of this suit, *was and still is* indebted to the company." This was demurred to ; but the Court held it good. *Alderson*, B., in delivering judgment, says, "The 26th section, it appears, provides, that certain requirements shall be stated in the declaration ; those requirements are stated, but there is an addition, which it was said was unnecessary to be there, that before the commencement of the suit, 'and from thence hitherto the party *hath been, and still is* the holder of divers, to wit, forty shares.' It would have been sufficient, and perhaps better, to have stated that the party 'was' such holder of forty shares only. This declaration states something special, the utmost effect to be given to which will be, that the declaration is in some degree subject to the objection of surplusage, which, however, cannot be taken advantage of." The thing to be proved is, that the defendant was the holder of the shares at the time of the making of the call, and it is not inconsistent with that,

(a) Mich. Vac., Exch. 1849. This case will be reported in 7 D. & L.

that he is so now. It cannot be more than surplusage; there are all the words required by the statute, and something more. In *Bristow v. Wright* (a), Lord Mansfield, speaking of what is surplusage, says, "where the declaration contains impertinent matter, foreign to the cause, and which the Master, on a reference to him, would strike out, (irrelevant covenants for instance), that will be rejected by the Court, and need not be proved." [He referred also to 1 *Chitt. Plead.* 252, 7th ed.] Here the Master might strike out all that is objected to as surplusage. The case of *The Newport, Abergavenny, and Hereford Railway Company v. Hawes* (b), has no application; for there the declaration was bad for want of certainty; all the allegations being governed by the word "whereas," and therefore stated only by way of recital.

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Hill in reply.

POLLOCK, C. B.—There must be judgment for the plaintiff, on the authority of the case in this Court of *The Midland Great Western Railway Company of Ireland v. Evans*, where the objection was distinctly taken, and overruled by the Court after taking time to consider. This objection, though not identical, is in spirit the same; if there is all that the statute requires, and something more, which may be struck out, the declaration is good.

ROLFE, B. (c)—I also think there should be judgment for the plaintiff. I think the declaration in this case is good within the decision of the case of *The Midland Great Western Railway Company of Ireland v. Evans*. At first I thought the cases not precisely similar, but now I think they are. I thought that the averment that "he is the holder," when coupled with the allegation that he

(a) Dougl. 665, 667.

(b) 3 Exch. 476.

(c) Parke, B., was absent from
indisposition.

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“was,” would mean more than it did in that case. There it was decided to be mere surplusage, and I think we are bound to give effect to that judgment.

PLATT, B., concurred.

Judgment for the Plaintiff.

May 1.

VERTUE *v.* THE EAST ANGLIAN RAILWAY COMPANY.

[In the Exchequer of Pleas.

Coram Pollock, C. B., Rolfe, B., and Platt, B.]

Where a bond given by a railway company under the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16) has been assigned in accordance with sect. 6, the proper party to sue on it is the assignee, not the original obligee.

Where such an assignment is pleaded, an averment that the money for which the bond was given was borrowed “in pursuance and exercise of the powers vested in the company under and by virtue of their act,” (which incorporated the general act), is sufficient, without alleging that a general meeting had been held, and an order made as is required by sect. 38.

DEBT on bond. The second plea,—after stating that the defendants, “in pursuance and exercise of the powers vested in them under and by virtue of the East Anglian Railways Act, 1847” (*a*), had borrowed of the plaintiff 1000*l.*, upon security of the bond sued on, and that the bond was duly registered,—alleged that the plaintiff, by deed sealed, &c., by virtue and in pursuance of the provisions of the said act, transferred the said bond and all his, the plaintiff’s, right and interest in and to the said money thereby secured, to Sir C. W. Taylor, Bart.; that after the making of the said deed and of the said transfer thereby made, and within thirty days after the date of the said last mentioned deed and transfer, and before the commencement of this suit, to wit, on, &c., the said deed and transfer was duly produced to W. Williams,

(*a*) 10 & 11 Vict. cclxxv., by sect. 5 of which the Companies Clauses’ Consolidation Act, (8 & 9 Vict. c. 16), is incorporated with the private act.

who then acted as, and was the secretary of the defendants, and who, as such secretary, then kept the said register of mortgages and bonds; and that the said W. Williams, so being such secretary as aforesaid, thereupon forthwith and before the commencement of this suit, to wit, &c. made an entry or memorial of the bond in the register, and thereupon, and from and immediately after the making of the said last mentioned entry or memorial, and before the commencement of this suit, to wit, on, &c., the plaintiff ceased to be entitled to or to have any right or interest in any respect to or in the said supposed writing obligatory in the declaration mentioned, so being such bond as aforesaid, or the money thereby secured, or the said supposed cause of action in the declaration mentioned, or any or either of them. That the said transfer, and the said entry or memorial of the said transfer, having been so made as aforesaid, thereupon, and from and immediately after the making of the said last mentioned entry or memorial, and before the commencement of this suit, to wit, on, &c., the said transfer, by virtue of the said act, entitled the said Sir C. W. Taylor, Bart., to the full benefit of the said bond and writing obligatory in all respects; and the said Sir C. W. Taylor, Bart., then and by virtue of the said act became, and was, and from thence hitherto hath been, and still was entitled to the said bond and writing obligatory, and to the said sum of money thereby secured, and to the benefit of the supposed causes of action in the said first count mentioned, &c. Verification.

Special demurrer and joinder in demurrer.

Prentice (with whom was *Peacock*), in support of the demurrer. By the East Anglian Railways Act, 10 & 11 Vict. c. cclxxv. s. 5, the Companies' Clauses Consolidation Act, 8 & 9 Vict. c. 16, is incorporated. By sect. 28 of the private act, the company are authorized to borrow money on mortgage or bond. By sect. 41 of the general act, 8 & 9 Vict. c. 16, "every mortgage and bond for securing money borrowed by the company shall be by deed under

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the common seal of the company." By sect. 46, "any party entitled to any such mortgage or bond may from time to time transfer his right and interest therein to any other person; and every such transfer shall be by deed duly stamped, wherein the consideration shall be truly stated; and every such transfer may be according to the form in the Schedule (E.) to this act annexed, or to the like effect;" and the form given in Schedule (E.) is: "I, A. B.," &c. "do hereby transfer," &c. "a certain bond," &c., "and all my right, estate, and interest in and to the money thereby secured." This transfer, it is submitted, assigns the interest in the bond, but not the right of action. The plaintiff must contend that by the assignment not only the bond but the right to sue thereon is transferred. By the common law a chose in action is not assignable; and though a bond may be assigned, the right to sue thereon cannot. It is true, there are many cases in which the assignee of a bond may sue, as in the cases of bail bonds, replevin bonds, and other instances collected in 1 *Chit. Plead.* 18, 7th ed.; but in all those cases the right to sue is expressly given by the statutes which make them assignable. Thus, the Bankrupt Act, 6 Geo. 4, c. 16, s. 63, after directing the commissioners to assign the bankrupt's personal estate to his assignees, expressly enacts, that the "assignees shall have like remedy to recover the same in their own names, as the bankrupt himself might have had if he had not been adjudged bankrupt." In *Jeffery v. McTaggart* (a), which was a decision under the Scotch Sequestration Act, 54 Geo. 3, c. 137, it was contended that the language of sect. 29 was comprehensive enough to pass a chose in action. That section, after directing that the bankrupt is to execute deeds of conveyance or assignment to the trustees, enacts, that "the whole estate and effects, of whatever kind, and wherever situate (in so far as may be consistent with the laws of other countries, when the effects are out of Scotland), shall be deemed and held

(a) 6 M. & S. 126. See *Sayer v. Dufaur*, 5 D. & L. 313.

to be vested in the trustee for the behoof of the creditors, and the Court shall declare every right, title, and interest, which was formerly in the bankrupt, to be now in the trustee; but Lord *Ellenborough* there says, "I cannot find any words conveying to the plaintiff a right of suit. The utmost extent to which the language of the act can be carried, is to a right of property." [*Platt*, B.—If the right of action is not assigned, all you assign is an equitable interest. The 8 & 9 Vict. c. 16, s. 46, says, "any party entitled," &c., "may" "transfer his right and interest therein."] Those words are not stronger than those in the Scotch Sequestration Act. [*Pollock*, C. B.—I confess I never could understand the case of *Jeffery v. McTaggart*. But it is observable that there the bond was to be assigned only once, here this bond may be assigned several times. Sect. 47, after directing the registry of every transfer, says, "and after such entry every such transfer shall entitle the transferee to the full benefit of the original mortgage or bond in all respects."] The case of *Jeffery v. McTaggart* was cited in *Sidaway v. Hay* (a), and was mentioned and recognised in the judgment of the Court.

A second ground of demurrer is, that it does not appear by the plea that the bond was one which could be assigned; only certain bonds can be assigned. Sect. 38 enables companies to borrow on mortgage or bond "such sums of money as shall from time to time, by an order of a general meeting of the company, be authorized to be borrowed." There is no averment in the plea that there was any general meeting, or that any order was made; it is only alleged that the money was borrowed "in pursuance and exercise of the powers vested in them under and by virtue of" their act. This is only a conclusion of law.

Bramwell, in support of the plea, was stopped by the Court.

(a) 4 D. & R. 658; S. C. 3 B. & C. 12.

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POLLOCK, C. B.—The defendant is entitled to judgment. The words in sect. 46 are, “may from time to time transfer his right and interest therein;” and the words in the form of bond given in Schedule (E.) are, “all my right, estate, and interest;” there being a particular power given to transfer what could not be transferred before, it must mean to all intents and purposes. How can the assignee have all the “right, estate, and interest” of the assignor, if he has not the right to sue? The object of the statute is to make the bond negotiable. As to the second objection, I think the averment sufficient.

ROLFE, B. (a).—I am of the same opinion. If the meaning of the act were not that the assignee might sue, it would be nugatory. In sect. 55 it is said that the books of account of the company are to be open to the inspection of “the respective mortgagees and bond creditors.” Now, who are the bond creditors? Not the parties to whom the bonds were originally given, but those to whom the bonds have been assigned.

PLATT, B.—I am of the same opinion; the word “interest,” in sect. 46, means legal interest.

PER CURIAM.

Judgment for the Defendant.

(a) *Parke*, B., was absent from indisposition.



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LEVY v. MOYLAN, SMEDLEY, FLACK, and TRACEY.

April 24,
May 2.

[In the Common Pleas.

Coram *Wilde, C. J., Cresswell, J., Williams, J., and Talfourd, J.*]

TRESPASS for assault and false imprisonment.

Plea by Smedley and Flack (*a*), as to the assault and conveying the plaintiff to prison,—after stating the establishment of the Westminster County Court of Middlesex, pursuant to the provisions of the 9 & 10 Vict. c. 95,—that before the said time when, &c., at and in the said Westminster County Court of Middlesex then holden in the said building in the declaration mentioned, in and for the said district under the said act, the defendant Dennis Creagh Moylan, then being the Judge of the same Court, did, according to the form of the said act, by a warrant under his hand, and sealed with the seal of the Court, and directed to the defendant Francis Smedley, as the high bailiff of the said Court, and to the other bailiffs of the said Court, and to all constables and peace officers within the jurisdiction of the said Court, and to the governor of the House of Correction for Middlesex, at Tothill Fields, Westminster,—after reciting that at the said Court so holden as last aforesaid, the plaintiff did wilfully insult him the said Dennis Creagh Moylan, Esq., the Judge of the said Court, during his sitting in the said Court so holden as last aforesaid, and that thereupon the said Judge did order that the plaintiff should be taken into custody, and detained until the rising of the said Court,—therefore require the said high bailiff, bailiffs,

To a declaration for trespass and false imprisonment against the high bailiff of a County Court and the governor of the gaol, the defendants justified under a warrant under the seal of the County Court, and directed to them, whereby, after reciting that the plaintiff had wilfully insulted the Judge during his sitting, and that thereupon the Judge had ordered the plaintiff to be taken into custody and detained until the rising of the Court, it “therefore” required the defendants to arrest the plaintiff, and imprison him for seven days.

Held,

(*a*) The defendant Moylan died shortly after the commencement of the action.

First, that the warrant

was not bad for uncertainty in specifying the cause of commitment;

Secondly, nor for omitting to describe the nature of the insult. And

Thirdly, that the recital the plaintiff had insulted the Judge was a sufficient adjudication of the offence.

Semble, that the County Courts, although Courts of record, are inferior Courts.

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&c., to take the plaintiff and to deliver him to the said governor of the said House of Correction; and by the said warrant the said Judge did require the said governor of the said House of Correction to receive the plaintiff, and him safely keep in the said House of Correction, for the term of seven days from the date of the said warrant, or until he should be sooner discharged by due course of law. The plea, after alleging that the said district of the said Court included part of the city and liberty of Westminster, proceeded to justify the trespasses under the authority of the warrant as high bailiff and assistant bailiff.

The defendant, Tracey, pleaded a similar plea as to the imprisonment of the plaintiff, justifying the imprisonment, under the same warrant, as governor of the Tothill Fields House of Correction.

Special demurrer to both pleas and joinder.

S. Temple (*Archbold* with him), in support of the demurrer. The warrant which has been pleaded in answer to the action is bad. First, it is bad for uncertainty. It recites that the plaintiff had wilfully insulted the Judge, and that the latter had ordered him to be detained until the rising of the Court; and then it "therefore" orders him to be committed for seven days: leaving it uncertain whether the insult, or the detention till the rising of the Court, or both the one and the other, were the cause of the commitment. If the insult was the real cause, the warrant is bad, because it couples with that cause another, and leaves it uncertain which was the cause intended. In *Rex v. Evered* (a), Lord *Mansfield* held, that a warrant for committing a prisoner "as an apprentice or servant for disobeying his indentures or articles," was bad for running in the disjunctive. The detention until the rising of the Court being recited in the warrant immediately before the "therefore," that must be taken, in strict grammatical construction, to be the cause of the commitment. But in that case the warrant is absurd and illegal; for the imprisonment of a person for a certain

(a) Cald. 26.

period is no legal ground for imprisoning him for a further time. If both the insult and the detention were the grounds for committing the plaintiff for seven days, the warrant is also bad, for one of them is insufficient. "If a man be committed for the non-payment of two sums, one of which is not due, the warrant of commitment is bad for the whole;" per Curiam in *Ex parte Addis* (a).

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But, further, the warrant is bad for omitting to adjudicate that any offence was committed. A commitment for contempt must be in writing; *Mayhew v. Locke* (b); and as the infliction of the punishment is a judicial act, the fact that the offence has been committed must be formally adjudged in the conviction. This warrant, it would seem, is in the nature of a conviction as well as a commitment; *Lindsay v. Leigh* (c); and it should, therefore, have contained an adjudication of the offence of which the prisoner was convicted. As it does not do so, the warrant is bad.

Next, the nature of the insult ought to have been set out on the face of the warrant. A commitment "ought to set forth the crime alleged against the party with convenient certainty, whether the commitment be by the Privy Council, or any other authority." "And this doth not only hold where no cause at all is expressed in the commitment, but also where it is so loosely set forth, that the Court cannot adjudge whether it were a reasonable ground of imprisonment; as where one was committed for manifold contumacy to the High Commission Court, or for refusing to answer before them certain articles, or for insolent behaviour and words spoken at the council table, &c." *Hawkins, Pleas of the Crown*, bk. 2, c. 16, sect. 16. It is true, the words of the act are, "if any person shall wilfully insult the Judge," and the warrant follows the act; but that, it is submitted, is not enough. According to *Peacock v. Bell* (d), "the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a superior Court, but that which specially

(a) 1 B. & C. 87, 90; S. C. 377.

2 D. & R. 167.

(b) 7 Taunt. 63; S. C. 2 Marsh,

(c) 11 Q. B. 455.

(d) 1 Wms. Saund. 73, 74 d.

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appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court, but that which is so expressly alleged." That is the principle upon which the case of *Gosset v. Howard* (a) was decided. There was no difference in that case between the Court of Queen's Bench and the Exchequer Chamber with respect to that principle, but only as to whether the warrant of the Speaker of the House of Commons was to be construed as the warrant of a superior, or of an inferior Court; and *Gosset v. Howard* decided that *Howard v. Gosset* (b) would have been rightly decided, if the warrant had been the warrant of an inferior Court. The word "insult" is a generic term; "contempt of Court" is only one species of insult, and obviously the only species for which the Judge has power to commit. It is, therefore, consistent with this warrant that the insult for which the plaintiff was committed was not a contempt of Court; and, upon the principle adverted to, it will not now be presumed to have been of that character. The Judge may have felt himself affronted by something which did not amount to a contempt of Court, and he ought to have stated in the warrant what the insult was, in order that a superior Court might be enabled to judge whether the alleged offence was really one. [*Cresswell*, J.—The County Court is a Court of record; is it not for the Judge of it to declare what is a contempt?] He should state the nature of the contempt; *Rex v. Judd* (c); *Rex v. James* (d). [*Wilde*, C. J.—May there not be many kinds of contempt which cannot be described in words, and which the Judge alone can understand?] If there be any, they are not such as the law authorizes a Judge to punish. The power which the law gives him is not for the purpose of gratifying feelings of vindictiveness or of a wounded amour propre, but for securing the proper administration of justice and protecting the Judge from degradation in the eyes of the public. [*Wilde*, C. J.—A Judge, without a single offensive word

(a) 10 Q. B. 411.

(b) 10 Q. B. 359.

(c) 2 T. R. 255.

(d) Cald. 458.

being uttered, but simply by a person's manner or gesture, might be put into such a state of irritation as to be altogether incapacitated from discharging his duty.] It is difficult to conceive any form of insult capable of interfering with the Judge's discharge of his duty which could not be described by words.

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It will be contended, that although the warrant may not justify the Judge, it affords a sufficient defence to the bailiff and the gaoler who acted in obedience to it; and 1 *Hale, Pleas of the Crown*, 595, and 2 *Hale, Pleas of the Crown*, 123, will be relied upon. The distinction, however, is not tenable. It is the duty of every officer acting in execution of a warrant to ascertain that it sufficiently shews jurisdiction. If the warrant had ordered the plaintiff to be committed for two years, or to be whipped, the officer would, beyond doubt, have been bound to know that it was illegal, and he would have been liable to an action if he had acted in obedience to it. There may be some inconvenience in this doctrine; but the opposite one, that an officer is bound to obey every warrant, however illegal, would be much more dangerous. The passages in *Hale, Pleas of the Crown* above referred to, will be found inapplicable, for they refer to cases of felony; in which, as well as in cases of high treason, it has always been considered sufficient to state the offence generally; *Hawkins, Pleas of the Crown*, ubi suprà. [*Samuel v. Payne* (a), and *Fox v. Gaunt* (b), were also referred to.]

Whateley (Sir *J. Bayley* with him), contrà, on behalf of *Smedley* and *Flack*. The warrant is sufficient. The first question to be considered is, whether it is to be construed as the warrant of a superior or of an inferior Court. The new County Courts are not inferior Courts, but Courts of a co-ordinate jurisdiction with those of Westminster Hall. An action cannot be brought in an inferior Court upon a judgment recovered in a superior one; *Com. Dig.* tit. "*Prohi-*

(a) 1 Doug. 345.

(b) 3 B. & Ad. 798.

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bition" (A.), citing 1 *Roll. Rep.* 54; and the reason is said to be, that the inferior Court has no means of getting at the judgment of the superior one. It has, however, been held, that such an action may be brought in the County Courts, and that the judgment of the superior Court may be proved there by means of a certiorari and mittimus; *In re Winsor v. Dunford* (a). From which it is to be inferred that the County Courts are superior Courts. If so, the warrant is clearly sufficient.

But further, it is sufficient, even if it is to be treated as the warrant of an inferior Court. The object of the 113th section of the County Courts' Act is to give the Judge power to commit for seven days any person wilfully insulting him; and in order to give a reasonable time for preparing a warrant, it authorizes the Judge to order the arrest of the offender and his detention till the rising of the Court, by word of mouth in the first instance. It clearly appears from the warrant that this was the course pursued with regard to the plaintiff; and the warrant, examined by the light of the 113th section, is free from uncertainty.

The objection, that there is no adjudication of the offence, is one which is not applicable to a committal for a contempt. "It was a mistake to assert," said *Parke*, B., in *Gosset v. Howard* (b), "as was done at the Bar, that an adjudication of a contempt was a necessary part of every committal for a contempt, and that an attachment would be invalid without it." The learned Judge, it is true, goes on to say: "It is not so in the superior Courts of common law, as has been before stated, nor in the Court of Chancery, as Lord *Lyndhurst* has lately decided; *Ex parte Van Sandau*" (c); but this last sentence, it is submitted, does not limit the application of the doctrine laid down in the preceding one, to the superior Courts. It is

(a) Q. B., Trin. Vac. 1848. cited from 12 Jur. 629. *In re Rance v. James*, Exch., Hil. Term, 1848, id. 62; and *In re Dunford*,

Exch., East. Term, 1848. id. 361, were also referred to.

(b) 10 Q. B. 455.

(c) 1 Phillips, 145, 605.

submitted that the same rule applies to all Courts of record. "It is clear," says the same learned Judge in *Watson v. Bodell* (a), "that a Court of record may commit by order to the custody of its officer in open Court, as the Queen's Bench or Quarter Sessions, for there is, or ought to be, a record of such commitment." The precedents in *Chitty's Criminal Law* (b) of commitments for contempt contain no adjudication of the contempt.

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Next, it is not necessary that the nature of the insult should be stated upon the warrant. The warrant is sufficient if it states the offence in the words of the act; and it has done so in this case. Whether the offence amounted to a contempt, is a question for the sole decision of the Judge who has been insulted; and there is, therefore, no necessity for describing the offence minutely. Besides, it may be often impossible to describe it. Insults may often be conveyed by a look, a gesture, or an allusion, unintelligible to bystanders, but as offensive to the person at whom they are aimed as the most disrespectful language or violent conduct; and yet it may be impossible to describe such insults. Suppose a Judge refused to fight a duel, and the challenger were to go into his Court, and, for the purpose of insulting him, twirled a white feather conspicuously between his fingers; such an act, per se, is perfectly innocent, but it would be most insulting to the Judge. And yet, how is such an insult to be described by words? In the case of *The Sheriff of Middlesex* (c), the Court of Queen's Bench held, that a warrant of the Speaker of the House of Commons, stating only that the prisoners had been guilty of a contempt, without more particularly setting forth the facts which constituted the contempt, was good; although the same Court, in *Howard v. Gosset* (d), considered such a warrant as the warrant of an inferior Court. [*Ex parte Pardy* (e) was also referred to.]

(a) 14 M. & W. 57, 70.

(c) 11 A. & E. 273.

(b) See 4 Chit. Crim. Law,
pp. 66, 81.

(d) 10 Q. B. 359.

(e) *Ante*, p. 118.

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But even if the warrant be bad as regards the Judge, it is sufficient to protect the bailiffs. By the 33rd section of the County Courts' Act, they are required to "execute all the warrants, precepts, and writs, issued out of the Court;" and the only question which the bailiffs had to inquire into was, whether the warrant was the warrant of the Court. If it was, they were justified in executing it; *Hale, Pleas of the Crown*, vol. 1, 595, and vol. 2, 123. [*Wilde, C. J.*—That is, if the warrant was legal; for the 33rd section only applies to the execution of all legal warrants. *Talfourd, J.*—In the 24 Geo. 2, c. 44, s. 6, there is a special protection given to constables acting in the execution of magistrates' warrants, where the magistrate has exceeded his jurisdiction; from which it might be inferred that, but for the act, the constable would have been liable.] In this case, the arrest of the plaintiff was an act done by the Judge in his judicial capacity, and there is nothing to shew that it was not done bonâ fide. No action lies against him for such an act, *Taaffe v. Downes (a)*; and none, therefore, can lie against the bailiffs.

Ogle, on behalf of Tracey. There is no authority in support of the proposition contended for by the plaintiff, that it is the duty of a gaoler to examine the warrant, for the purpose of ascertaining whether the Court which issued it had jurisdiction to do so; and the establishment of such a principle would be most inconvenient. It would, in effect, make the gaoler a Court of appeal from the Judge; for if the former, upon examining the warrant, was bound to take upon himself to decide that the Judge had exceeded his jurisdiction, he must be at liberty to refuse to act upon it. Suppose, for instance, that, as contended on the other side, the nature of the insult must be set forth on the warrant, and the facts set forth in any given case were not such as to amount to what the gaoler considered an insult, he might

(a) 3 Moo. Priv. Coun. Ca. 36, n.

refuse to obey the warrant. The duty of the gaoler is simply to obey the order of the Court; he is like the sheriff, who is bound to execute a judgment, however erroneous it be.

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S. Temple, in reply.

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the Court.—This case comes before the Court upon demurrer to the pleas of the defendants.

The action is for an assault and false imprisonment, brought against the late Judge of the Westminster County Court, the high bailiff of Westminster and his deputy, and the keeper of the House of Correction.

The declaration is in the ordinary form.

The defendant Moylan died after the action was commenced; the other defendants justified under a warrant granted by the defendant Moylan, as Judge of the County Court.

The plaintiff specially demurred to the pleas of justification, and the demurrers were argued before us on Wednesday last.

The warrant is set out in the pleas.

Several special causes of demurrer are assigned, but those relied upon in the argument were:

1. That the supposed offence or ground of commitment was, upon the face of the warrant, uncertain.

2. That the warrant recited "that the plaintiff had insulted the Judge of the County Court, and had been taken into custody and detained till the rising of the Court; and therefore the officers were commanded to take the plaintiff, &c., and convey him, &c."

It was argued that the word "therefore" must apply either to the last matter recited; in which case the detention of the plaintiff till the rising of the Court would appear to be the cause of his committal to the House of Correction, which would be absurd: or that it must refer

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to both the matters recited; and then, of the two causes for his committal, one would be altogether insufficient: or that it must leave the real ground of committal uncertain: and in any case the warrant would be bad, and being bad on the face of it, would not justify the officers.

It was also said that the warrant was bad in another particular, viz., that it did not set forth the nature of the supposed insult offered to the Judge, so as to enable this Court to ascertain whether any such insult had been offered as would give the Judge power to commit. On the other hand, it was said that the warrant must be read with reference to the 113th section of the 9 & 10 Vict. c. 95,—which enacts, that if any person shall wilfully insult the Judge, or other officers mentioned in the act, during his sitting in Court, it shall be lawful for any officer of the Court, by order of the Judge, to take such offender into custody and detain him until the rising of the Court; and the Judge shall be empowered, if he shall think fit, by a warrant under his hand, and sealed with the seal of the Court, to commit any such offender to prison for any time not exceeding seven days;—and that the meaning to be ascribed to the warrant, then, was, that the party having wilfully insulted the Judge, and having been ordered by him to be detained till the rising of the Court, the Judge had thought fit, by warrant, to commit him to prison for seven days. It was also said, that with reference to the sufficiency of the description of the insult, the officers were, at all events, protected, as they could not dispute the propriety of the Judge's decision; and that even if the matter related to the Judge himself, as defendant, the warrant would suffice, for that his Court was a Court of record, and a superior Court.

It is not necessary to decide this latter point; but there are strong reasons for saying that the Courts held under the 9 & 10 Vict. c. 95, are inferior Courts, although Courts of record. They are still in their nature County Courts, which are undoubtedly inferior. Their jurisdiction is limited to the nature of the causes to be tried, and the ambit within which the cause of action must have arisen; and causes

commenced there are removable into the superior Courts, except in certain cases where it is expressly prohibited by sect. 94.

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Assuming that the warrant in question is to be treated as having been issued by the Judge of an inferior Court, we nevertheless think it sufficiently describes the offence for which the party was committed. In the first place, the recital that the party had insulted the Judge, is to be treated as a direct adjudication that he had done so, according to the case of *The Sheriff of Middlesex* (a); and as the statute, by sect. 113, gives the power to commit for any insult wilfully offered to the Judge or his officers, or for any wilful interruption of the proceedings of the Court, or any other misbehaviour in Court, and as many acts may come within that provision which it would be impossible adequately to describe in words, it seems to us that the Judge had jurisdiction to decide conclusively whether any particular act did amount to an insult, or interruption, or misbehaviour. It was, therefore, unnecessary to say more in the warrant than that he had been wilfully insulted.

As to the cause of commitment, we adopt the argument urged for the defendants, that we are not (unless it be absolutely necessary) to construe the warrant so as to make it absurd and nonsensical, which we should do in holding that it assigns the detention of the plaintiff till the rising of the Court, as a cause for committing him to the House of Correction. The recital of his detention is to be taken as the narrative of the Judge of what took place after the insult was offered, and not as a cause for the subsequent issuing of his warrant.

Both the objections taken to the warrant, therefore, fail; and our judgment must be for the defendants.

Judgment for the Defendants.

(a) 11 A. & E. 273.

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DIMES v. LORD COTTENHAM.

[In the Exchequer of Pleas.

Coram *Pollock, C. B., Rolfe, B., and Platt, B.*]

The Court refused to grant a trial at bar on the motion of the plaintiff, on either of the three following grounds. First, that the defendant was Lord Chancellor; second, that the plaintiff was an attorney of the Court in which the action is brought; third, that a question would arise in the cause, whether the Lord Chancellor could hear and determine a suit in favour of a corporation of which he was a member, and in which suit he had a pecuniary interest.

SMYTHIES moved on behalf of the plaintiff, for a rule absolute in the first instance, or if the Court should think fit, for a rule to shew cause why there should not be a trial at bar in this cause. The affidavit in support of the application stated, "that the declaration is in trespass for false imprisonment, and that the plaintiff is an attorney of this Court, that the defendant is the Lord Chancellor, and that one of the questions that will arise in this cause is, whether the Lord Chancellor is competent to hear and determine a suit in favour of a corporation of which he is a member, and in which suit he has a pecuniary interest." There are three grounds on which the plaintiff is entitled to a trial at bar in this case. First, the defendant is the Lord Chancellor. In *Morton v. Hopkins* (a), the plaintiff being a justice of the King's Bench, a trial at bar was granted, without any affidavit. It is there said, that if a Judge or a Master in Chancery is concerned in the cause, it is good ground for a trial at bar. [*Pollock, C. B.*—The state of the administration of the law was then so different, that we cannot be guided by those cases. There is now no period of the year when a trial at bar is not a great inconvenience, both to the Bench, the Bar, and the public; the Court will not, therefore, grant it, unless there be weightier reason than that the plaintiff is entitled to it, because the defendant would be, if he chose to ask for it.] The second ground is,

(a) Sid. 407.

that the plaintiff is an officer of this Court, being an attorney. In *Sir Samuel Astry's case* (a), the Court said, that "a trial at bar was never denied to any officer of the Court, nor hardly to any gentleman at the Bar." [*Pollock*, C. B.—That is no ground.] Lastly, there should be a trial at bar in this case, in consequence of the importance of the question that will be raised; viz., whether the rule, that a Judge should not sit in a cause, where he is a party, applies to a case like the present.

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PER CURIAM.

Rule refused.

(a) 2 Salk. 651.

BROAD v. CAREY.

May 2.

[In the Exchequer of Pleas.

Coram *Pollock*, C. B., *Rolfe*, B., and *Platt*, B.]

THIS was a rule to enter a suggestion on the roll, to deprive the plaintiff of costs, under the County Courts' Act, 9 & 10 Vict. c. 95, s. 129.

The rule was granted upon an affidavit, which, after stating that the action was brought to recover 25*l.* for commission as an agent, and that the jury found a verdict for 18*l.*; further stated, "that the cause of action arose in Church Street, Hackney, within the jurisdiction of the Shoreditch County Court of Middlesex."

Prentice shewed cause. The affidavit is defective. It is not sufficient to state that "the cause of action" arose

In an affidavit on which is grounded a motion to enter a suggestion to deprive the plaintiff of costs under the County Courts Act, it is sufficient to state that the "cause of action" arose within the jurisdiction, without stating specifically what constitutes the cause of action.

Where the affidavits are contradictory as to the fact of the cause of action having arisen within the jurisdiction, the Court will not entertain the question on motion, but will leave the parties to go to trial upon the suggestion.

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within the jurisdiction, for that is only a conclusion of law ; the proper form is to allege that the work and labour, &c., was done at a certain place. It is sometimes a question of great doubt how far the cause of action can be said to arise “ wholly or in some material point ” in any particular place ; and there have been several decisions on this very point. [He then proposed to read affidavits of the plaintiff and his attorney, which denied the statements in the defendant’s affidavit, and shewed that the cause of action did not arise within the jurisdiction of the County Court, and that it had so appeared at the trial.]

SED PER CURIAM (*a*).—If the fact is disputed you must go to trial on the suggestion.

Rule absolute.

(*a*) *Pollock, C. B., Rolfe, B., and Platt, B.*

May 4.

GOSLING v. CONDER, the Younger.

[In the Queen’s Bench.

Coram *Coleridge, J.*]

Where the plaintiff took out a summons to try the cause before the sheriff, which the defendant opposed, and an order was made dismissing the

summons, upon the defendant’s consenting that in the event of the plaintiff obtaining a verdict, his costs should be taxed upon the higher scale ; and a verdict passed for the plaintiff for less than 20*l.* : *Held*, that this Court would not permit the defendant to enter a suggestion to deprive the plaintiff of costs, under the County Courts’ Act (9 & 10 Vict. c. 95, s. 129).

THIS was a rule for a suggestion to deprive the plaintiff of costs, under the County Courts’ Act.

It appeared upon the affidavits that the above action was brought to recover a sum of 6*l.* 12*s.*, being the amount of a legacy left under a will to which the defendant was executor. Issue having been joined, the cause came on for trial

before Mr. Justice *Wightman* at the last Spring Assizes for the County of Suffolk, when a verdict was returned for the plaintiff for a sum of 4*l.* 10*s.* debt, and no more. An application had been made to *Coleridge*, J., at Chambers, to try the cause before the sheriff, which was opposed by the defendant, who objected that the action should have been brought in the County Court, and not in the superior Court; and also stated that there were executorship matters connected with the action, and that some question of law might arise. The Judge then made an order, directing that the summons should be “dismissed, the defendant hereby consenting that the taxation of costs shall be on the higher scale, if a verdict be found for the plaintiff.” At the trial the Judge did not certify that the cause was a fit one to be tried in this Court. The affidavits stated facts shewing that the action ought to have been brought in the County Court, and negatived the exceptions in the 128th section in the usual manner.

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Lush shewed cause. The defendant cannot make this application after having opposed an application to try before the sheriff, and consented to a Judge’s order, that if a verdict should be found for the plaintiff, the costs should be taxed on the higher scale. It is a breach of good faith after such a consent to ask for a rule that would deprive the plaintiff of costs altogether. The defendant chose to have the case tried in the superior Court; and he undertook, in the event of a verdict passing for the plaintiff, to pay the plaintiff the costs as payable in the superior Court.

O’Malley, in support of the rule. The question is not whether the action should have been tried before the sheriff or before a Judge, but whether the plaintiff ought not to have brought his action in the County Court. It appears upon the affidavits that matters of law were likely to arise; and the defendant might have had no objection

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to try the cause before a Judge of a County Court who must be a barrister of some standing, although he had a strong one to try it before an undersheriff. The objection was made before the Judge at Chambers, that the action should have been brought in the County Court; there is, therefore, no breach of good faith. Besides, it is submitted that although the defendant is obliged to come to the Court for permission to enter a suggestion, the Court will not exercise any discretion in the matter, when the case is brought within the provisions of the act. The 129th section, in giving the Judge at the trial the power to grant a certificate that the cause was a proper one to be tried in the superior Court, points out the mode in which the discretion as to costs is to be exercised. The plaintiff should have applied to the Judge at the trial to grant a certificate; and not having done so, he cannot resist this application.

COLERIDGE, J.—Mr. *O'Malley*, in the latter branch of his argument, has put this case upon the only ground on which I think it can be put, and on the only ground on which I entertain any doubt; namely, whether on an application of this kind, where the case is clearly brought within the provisions of the statute, the Court has any discretion in granting a suggestion; and if it were necessary to decide that point, I should have liked to take time to consider the question.

But I think that this case may be decided upon the preliminary point, that it is not competent to the defendant to make this application, after what has occurred before me at Chambers. The plaintiff took out a summons to try the cause before the sheriff, and the defendant attended before me and opposed the application, alleging that there were executorship matters in dispute, and that points of law might arise. I then asked the defendant if he would consent if I dismissed the summons, that the plaintiff should have his costs upon the higher scale, in the event of his

obtaining a verdict. The defendant said that he would, and an order was accordingly drawn up, dismissing the summons, the defendant "consenting that the taxation of costs should be on the higher scale." Now what is the meaning of those words? Clearly, that the plaintiff should have costs, if he obtained the verdict. Is then that agreement inconsistent with the present application? I think it is so inconsistent that the defendant cannot be permitted to come and make this application, and the present rule must therefore be discharged.

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Rule discharged.

REGINA v. JAMES DAVIES, Esq., and two Others, Justices
of HEREFORDSHIRE.

May 6.

[*Bail Court. Coram Coleridge, J.*]

THIS was a rule calling upon James Davies, Esq., and two others, justices of the county of Hereford, and upon James Pugh their clerk, and George Humphrys, to shew cause why they, or such of them who shall have the lawful custody thereof, should not deliver to William Humphrys, or to his attorney, copies of the examinations of Charles Price Wilson and of Joseph Flint, witnesses upon whose depositions (taken on the 10th of April, 1849, in a certain investigation heard before them the said justices on the complaint of the said George Humphrys against the said William Humphrys), the said William Humphrys was committed to prison; and also copies of certain letters produced

The 11 & 12
Vict. c. 42,
s. 27, which
gives to an
accused party
the right to
a copy of the
depositions
taken against
him, applies
only to the
case of a person
committed to
prison or ad-
mitted to bail
for the purpose
of being tried.

Where,
therefore, one
H. had been
committed to
gaol until he

should give sufficient securities for keeping the peace, and for appearing at the sessions or the assizes to do what should be then enjoined by the Court: *Held*, that he was not entitled to a copy of the depositions under that section.

A party applying to this Court for a rule under the 11 & 12 Vict. c. 44, s. 5, calling upon the justices to furnish copies of the depositions taken against him, must shew a right existing at the time of his application to the Court, as well as at the time of the refusal by the justices to grant the copies.

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at such hearing by the said George Humphrys, and purporting to have been written by the said William Humphrys, on payment of a reasonable sum for the same, &c.

The following facts appeared upon the affidavits. On the 10th of August, 1849, William Humphrys, the party on whose behalf the present rule was obtained, was taken before the justices named in the rule, and who were then sitting in petty sessions at Kington in Herefordshire, charged upon the following information of one George Humphrys. The information and examination were as follow:—

Herefordshire, to wit. The information of George Humphrys, of, &c. That lately, viz., in the months of June and July last, this informant received through the post the letters signed “William Humphrys,” now produced, and from the contents of them, and from other circumstances and molestations committed by the said William Humphrys towards him this informant, he this informant is now under fear and apprehension that the said William Humphrys will take the first opportunity of doing this informant or his family some bodily hurt, unless he is restrained therefrom by law. That he doth not make this information from any motive of malice or ill will, but merely for the safety of his life and person, and therefore prays that the said William Humphrys may be required to find sufficient sureties to keep the peace and be of good behaviour towards him this informant. Taken, &c.

The examination of George Humphrys, Esq., of, &c. I reside at, &c. About nine o'clock on Tuesday evening (the 7th August instant), I heard the outer door bell of my house ring violently, by which my family was alarmed. My servant William Jenkins, accompanied by Joseph Flint my gardener, went to the door. The boy Jenkins returned, and said the person at the door was the same person who had been there some time before. I went to the outer door, and there saw the defendant William Humphrys standing on the outside. I told him he might go back to the place from which he came, that he should not remain on my

premises, and that I would hold no communication with him whatever. I closed the door and fastened it. I then gave directions to Flint, that if the defendant should be about my premises the following morning, to tell him that he (Flint) had strict orders from me to order him away, that I would not see him, and that if he refused to go he was to remove him by force if necessary, or that if he thought it expedient he should send for a policeman. I believe the defendant was pacing about my house till midnight, for I heard footsteps which I believed to be his. The defendant had no business whatever with me, for I never had any acquaintance with him; I believe his only object was to extort money from me. The four letters which I now produce I believe to be the defendant's handwriting, which he has now admitted. From the tenor of the letters, and from the defendant's conduct on this and a former occasion, I solemnly declare that I am in fear he will do me or my family some bodily harm, or some injury to my property. Taken, &c.

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The justices having heard this evidence, as also the evidence of Joseph Flint, the prosecutor's gardener, and of Charles Price Wilson, the policeman, and after the examinations so taken had been reduced into writing, made the following warrant of commitment:—

Herefordshire, to wit. To the constable of, &c., and to the keeper of, &c. Whereas George Humphrys, of, &c. (the information was here set out verbatim). And whereas the said William Humphrys is before us to answer the said information, and we, having heard, &c., have ordered that he shall enter into a recognizance with two sureties, himself in 20*l*., and two sureties in 10*l*. each, as well for his appearance at the next general quarter sessions of the peace for the said county, to do what shall be then and there enjoined him by the Court, as also in the meantime to keep the peace and be of good behaviour towards her Majesty and all her liege subjects, and especially towards the said George

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Humphrys; but the said William Humphrys hath refused so to do:—

These are therefore to command you the said constable to convey and deliver into the custody of the said keeper of the said county gaol the body of the said William Humphrys, and you the said keeper are hereby required to receive the said William Humphrys into your custody into the said county gaol, and him there safely keep until the next general quarter sessions of the peace to be holden for the said county, unless in the meantime he and two sufficient sureties enter into such recognizances as aforesaid, conditioned as aforesaid. Given, &c. Signed and sealed.

Under this warrant of commitment William Humphrys was conveyed to Hereford county gaol, where he remained in custody until the 15th of October in the same year, when he was discharged by the Court of quarter sessions, no one appearing to prefer any charge against him. Prior, however, to the sessions being held, he had made application to Mr. Pugh, the magistrates' clerk, for a copy of the depositions, which the magistrates refused to furnish. William Humphrys, at the commencement of these proceedings, was an officer in the employment of the Customs, but in consequence of his absence from his duties the Board of Inland Revenue superseded him. On the 22nd of January, 1850, his present attorney wrote to Mr. Pugh, that William Humphrys had been superseded, and requested to be furnished with copies of the examinations and information, stating that unless the defendant could lay those documents before the Board of Inland Revenue, so as to shew that the committal was not in consequence of any felony or criminal offence, he would not be restored to his situation. The magistrates at first declined to grant these copies, saying that it was not the custom of their sessions to grant copies of the depositions on summary convictions; but after some correspondence, they furnished a copy of the information, and of the examination of George Humphrys, but refused

to give copies of the depositions of the other two witnesses; and it was sworn on their part that the letters produced, and which were referred to but not copied into the depositions, were handed back to Mr. George Humphrys after being read. The present rule was obtained on the 20th of April in the present year.

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Crompton, on behalf of the justices, now shewed cause. The justices are willing to obey any intimation of the opinion of this Court. They only desire to know whether they are legally bound to furnish copies of the depositions in a case like the present. The question turns upon the construction of the 11 & 12 Vict. c. 42, s. 27, by which it is enacted, that “at any time after all the examinations aforesaid”—(that is the preliminary examinations taken before the magistrates upon which a party is committed for trial),—“shall have been completed, and before the first day of the assizes or sessions or other first sitting of the Court at which any person so committed to prison or admitted to bail as aforesaid is to be tried, such person may require and shall be entitled to have, of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same,” &c. Under this section, it is submitted a party is only entitled to a copy of the depositions where he has been committed to prison or admitted to bail to take his trial upon a criminal charge at the sessions or assizes. The former statute on the subject,—the 6 & 7 Wm. 4, c. 114, section 3 of which enacts, that “all persons who” “shall be held to bail or committed to prison for any offence against the law, shall be entitled to require and have, on demand,” &c., “copies of the examinations of the witnesses respectively upon whose depositions they have been so held to bail or committed,” &c.,—is repealed by sect. 34 of the 11 & 12 Vict. c. 42, and the foregoing section substituted in its place. But even if it were in force, the present case would not come within the

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former act, its object being, as may be learnt from its title and general language, to give facilities to persons "indicted for felony" for making their defence on their trial. [He referred to the language of the 1st, 2nd, and 3rd sections.] The justices have already granted a copy of the information and of the deposition of the principal witness, and if the object of the applicant were only to satisfy the Board of Inland Revenue of the nature of the charge against him, he has already sufficient materials; and if it be to bring an action against the justices, the Court will not further that object by granting this application.

J. Henderson, on behalf of George Humphrys, shewed cause. Mr. George Humphrys cannot be called upon to give copies of letters which it is true he produced before the justices, but which form no part of the depositions. [*Coleridge, J.*—The other side will no doubt contend that they are part of the depositions before the justices, and that although the letters were restored to him after being read, and were not copied into the depositions, it is the same thing as if the justices had handed part of the depositions to him to keep.] The applicant has no right to them at common law; and all that he can claim is a copy of the depositions, as taken by the justices. Whether the justices exercised a proper discretion in omitting to insert these letters in the depositions, is another question. [*Coleridge, J.*—Suppose the letters had been annexed to the deposition of the witness, and had been handed, together with the deposition, to Mr. George Humphrys?] In that case, perhaps, he might be considered as custos of the depositions. [He also took the same objections to the rule as were urged by *Crompton*.]

Alexander in support of the rule. The Legislature could not have intended, in passing the 11 & 12 Vict. c. 42, s. 27, and repealing the former provision on this subject, (the 6 & 7 Wm. 4, c. 114, s. 3,) to circumscribe the benefit

conferred upon prisoners. By the earlier statute, every person who is committed to prison or admitted to bail "for any offence against the law," is entitled to have a copy of the depositions. Here William Humphrys is clearly committed for an "offence against the law." But even if the construction of the later act were doubtful, this Court would be disposed to construe it liberally, and so as to extend rather than to limit the benefit conferred. The Court will grant this application, if it can see that upon the depositions and information as they stand, the applicant might be indicted. Now, there is nothing to prevent him from still being indicted at the sessions. He is entitled to have the whole of the depositions if he is entitled to any part; and it is not for the justices to say what part they consider sufficient for the prisoner's object. The deposition of G. Humphrys states that he believes that the sole object of the applicant was to extort money; and the Board of Inland Revenue would therefore exercise a sound discretion in refusing to restore him to his situation until they had all the facts before them.

As to the letters in the custody of William Humphrys, it is submitted that they are as much a part of the depositions as if they were actually copied into them. In a late case in the Exchequer, a letter was produced and given in evidence at a trial, and afterwards, when a motion for a new trial was made, the opposite party refused to produce it, or to give a copy; and the Court refused to deliver up the postea to them until they did; and the case so stands at present. There is nothing in the affidavits to shew that any action is about to be brought; indeed if any were, it would not be necessary to resort to this application, as there would be a cheaper mode of effecting the object, by issuing a subpoena duces tecum. If William Humphrys was entitled to a copy of these depositions at the time when they were first demanded, the Court will order them to be furnished now, as they are still of use to him.

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COLERIDGE, J.—I am of opinion that this rule must be discharged, unless the party moving it had, at the time of so doing, an existing right to have these depositions and letters produced. It is not sufficient that he had the right at the time of the application to the justices, unless he also had it at the time of the application to this Court; for the present rule is merely substituted for the old proceeding by mandamus, which the Court never would grant, merely because there had been a right and a duty at some time previous, unless that duty and right were also existing at the time of the application.

Now, whether or not this party had, at the time he made this application, a right to have a copy of these depositions and the letters produced before the justices, will depend upon the construction to be put on the 11 & 12 Vict. c. 42, s. 27; and if that section is confined to the case of persons committed for “trial,” and with a view to enable them better to prepare for their defence, this application falls to the ground. Looking at the act of Parliament, I cannot doubt that such is the meaning of the act.

In the first place, the title of the act is “An Act to facilitate the performance of the duties of Justices of the Peace out of Sessions with England and Wales, with respect to persons charged with indictable offences.” It then goes on to specify the mode of taking the examination of the witnesses when the parties are brought before the magistrates (which is all I need now look at). The examination of the accused is also mentioned. The depositions of the witnesses are to be read over to him, and the prisoner is to be asked whether he wishes to say anything, and to be warned that whatever he says may be given in evidence against him upon his “trial” afterwards. Then the 27th section says, that at any time “after all the examinations aforesaid shall have been completed,”—(those are the examinations of the witnesses charging him, and of the prisoner himself, before the magistrates),—“and before the

first day of the assizes or sessions" "at which any person so committed to prison or admitted to bail as aforesaid is to be tried;" (clearly therefore leading only to one interpretation,—that the party has either been committed to prison to take his "trial" at a particular time, or that he has been admitted to bail to make his appearance at a certain time for the purpose of being "tried,") "such person may require and shall be entitled to have, of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed." It therefore gives the party the right to a copy of the depositions under those circumstances, and under those circumstances only: for we must limit it to what is the general intention of the whole act of Parliament; and what is consistent with the words of the section itself.

That being, as I think, the clear construction of the act of Parliament, the next question is, what were the facts in this particular case?

Now, looking at the information, I find that no indictable offence is charged. There is a statement only of certain facts, and a reference to letters and belief stated in the ordinary way upon oath that the party making the application thought himself bodily in danger from something that the defendant might do; and we find that the magistrates thereupon issue their warrant to commit the defendant until he shall find sureties, for what—"as well for his appearance at the next general quarter sessions,"—not to take his trial—but "to do what shall be then and there enjoined him by the Court, as also in the meantime to keep the peace," &c., "towards the said George Humphrys." He is to find sureties of course, if the Court shall think proper, and in the meantime, to keep the peace towards the party who made the application. I think that was clearly a case merely of commitment for want of sureties to keep the peace in the meantime, and to do what should be required of him at the sessions or assizes; but it was not a case in which there was to be any trial.

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It has, however, been said, that although nothing has been done at the sessions, the prosecutor has still, upon the facts stated in the depositions, the power of indicting the defendant. I admit that is so; but the fallacy lies in supposing that he may indict him on these depositions. He may go before the grand jury and charge him with some acts contained in the depositions, and make out that they are an attempt to extort money, and if the grand jury should think so, they may find a true bill to that effect. But that will not be an indictment charging him upon these depositions at all. Therefore that argument with which I was struck at first, seems to me ill founded.

I am wholly indifferent whether the 27th section of this later act is to be taken as restricting the former enactments of the 6 & 7 Wm. 4, on this subject; as nothing I have heard to-day satisfies me that the earlier act intended to go any further than the later one.

The rule must, therefore, be discharged. As the justices, however, have requested my opinion on the point, I see no reason why they should not grant copies of the rest of the depositions; and if I had decided this case differently, I think I should not have been disposed to make any difference between granting copies of the letters and of the depositions.

Rule discharged (*a*).

(*a*) *Crompton* then on behalf of the justices, and *J. Henderson* on behalf of Mr. G. Humphrys, undertook to furnish copies of the depositions and letters.



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HEATH v. LONG.

May 6.

[*Bail Court. Coram Coleridge, J.*]

THIS was a rule to enter a suggestion to deprive the plaintiff of costs under the County Courts' Act, (9 & 10 Vict. c. 95).

The following facts appeared upon the affidavits in support of the rule. The action was in assumpsit. The first count was by a second indorsee against the drawer of a bill of exchange for 8*l.* 12*s.* 3*d.* The second count was upon an account stated. The defendant pleaded to the first count a traverse of the drawing of the bill, and to the second count the general issue. Upon these pleas, issues were joined. At the trial, which took place before the Judge of the Sheriff's Court of London, the plaintiff obtained a verdict for 8*l.* 13*s.* 3*d.* The usual averments were contained in the affidavits to bring the case within the operation of the statute, and the ground relied on in support of the motion for a suggestion was, that the cause of action arose in a material point within the jurisdiction of the County Court,—the bill having been drawn and indorsed at the defendant's dwelling-house and place of business within the jurisdiction of the Bloomsbury County Court of Middlesex, and the only notice of dishonour which the defendant received, having been given to one Stephen Wood, his clerk, at the same place, by one James Henry Lee, who was the first indorsee of the bill of exchange, and who then stated himself to be "the holder thereof."

The affidavit in opposition to the rule was made by

defendant dwells, it is immaterial whether the plaintiff knows that fact or not.

Assumpsit against the drawer of a bill of exchange, to which the only plea was a traverse of the drawing. On motion to enter a suggestion to deprive the plaintiff of costs under the County Courts' Act, *Held*, that notice of dishonour having been given by the plaintiff within the jurisdiction of a County Court, the cause of action "in a material point" arose within that jurisdiction. On a motion to enter a suggestion to deprive a plaintiff of costs under the County Courts' Act, on the ground that the cause of action arose, in a material point, within the jurisdiction of a County Court within which the

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James Henry Lee, who stated that the bill was delivered to him with the defendant's name indorsed on it, and discounted by him at a place named not within the jurisdiction of the County Court; and that the bill was presented and dishonoured at a place also not within the jurisdiction of the County Court. The affidavit concluded with the following statement:—"And this deponent further says, that he denies that he represented himself to Stephen Wood, the clerk of the defendant, to be the holder of the said bill, *when he deponent gave notice of the dishonour thereof for the plaintiff.*"

Lush shewed cause. The defendant is the drawer of the bill of exchange upon which this action is brought, and the plaintiff is a subsequent indorsee. It does not appear that the plaintiff knew where the bill was drawn; and the question is, whether the case comes within the 128th section of the 9 & 10 Vict. c. 95. The Legislature could scarcely intend, that in the case of a bill of exchange, a remote indorsee, who can have no means of knowing where the bill is drawn, should be bound to sue in the County Court. In order to deprive the plaintiff of costs under this act, it is submitted there must be a wilful suing in the superior Court, when the plaintiff knows that he ought to sue in the County Court. A remote indorsee can scarcely be taken to be guilty of this. It may perhaps be different where the plaintiff takes the bill of exchange direct from the drawer. If this view be correct, the present application must fail; as the affidavit in answer shews that the delivery of the bill took place out of the jurisdiction; and the notice of dishonour, although given within it, is not put in issue upon the pleadings.

Gray, in support of the rule. The objection that the plaintiff must know that the cause of action arose "wholly

or in some material point" within the jurisdiction, in order to be deprived of costs, if well founded, would much impair the effect of the statute. Here, however, the notice of dishonour, which the plaintiff gave, was given within the jurisdiction of the County Court within which the defendant dwelt; and although the state of the pleadings did not render it necessary to prove the notice, it was not less a material point of the cause of action. For the materiality is to be judged of at the time of the commencement of the suit, and not at the time of the trial. The averment in the declaration of notice of dishonour was material, and might have been traversed. [He was then stopped by the Court.]

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COLERIDGE, J.—I should be very sorry to introduce into the section the restriction which Mr. *Lush* contends for; because, in numerous cases, the plaintiff is unable to ascertain whether the cause of action did not arise "in some material point" within the jurisdiction of the County Court, within which the defendant dwells; and to adopt the construction contended for, would be to defeat the object of the statute, which was to discourage the bringing actions for small sums in the superior Courts. Nothing is said in the statute respecting any knowledge, on the part of the plaintiff, of the place where the cause of action arose. It is sufficient, I think, if the cause of action does, in fact, arise "in some material point," within the jurisdiction, whether the plaintiff knows it or not. This case, however, may be decided, independently of this point, upon another ground; namely, that here the notice of dishonour, which, on these affidavits, must be taken to have been given with the knowledge of the plaintiff, was given within the jurisdiction. The notice of dishonour, was clearly a material point of the cause of action; for without it the action could not be maintained. It is true that it was not in issue between the parties at the trial; but the question is not whether it was then in dispute

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between the parties, but whether it was a "material point" of the cause of action at the time when the action was commenced, which in this case it undoubtedly was.

Rule absolute.

May 6.

REGINA v. JUSTICES OF GLAMORGANSHIRE.

[*Bail Court. Coram Coleridge, J.*]

A rule of practice at sessions, that when an order of removal is quashed upon appeal, only 40s. shall be allowed for the appellants' costs, is bad; and if the sessions act upon such a rule, this Court will grant a mandamus commanding them to consider the question of costs in the particular case, and to award to the appellants such costs as they in their discretion shall think reasonable and just.

THIS was a rule nisi for a mandamus to the justices of the county of Glamorgan, to enter continuances upon an appeal of the churchwardens and overseers of the parish of Nevern, in the county of Pembroke, against an order of removal of a pauper from the parish of Merthyr Tydvil, in the county of Glamorgan, to the next general quarter sessions; and "to proceed to consider, award and order such costs and charges as by the said justices, in their discretion, shall be thought most reasonable and just, to be paid by the churchwardens and overseers of the poor of the said parish of Merthyr Tydvil to the churchwardens and overseers of the poor of the said parish of Nevern, in pursuance of the several statutes in that behalf, to wit, the 8 & 9 Wm. 3, c. 30, s. 3, and the 4 & 5 Wm. 4, c. 76, s. 82."

It appeared that the appeal, mentioned in the rule, came on for trial at the Epiphany Quarter Sessions in the present year, held for the county of Glamorgan, when the case was gone into on the merits, and the order of removal quashed. There was a rule of practice at the sessions, that when an order of removal was quashed upon appeal, the appellants should only be allowed 40s. costs. The appellants, in the present instance, applied that the order should be quashed, not only with 40s. costs, according to the rule of sessions, but with such reasonable costs and charges as were contemplated by the 4 & 5 Wm. 4,

c. 76, s. 82, and which that statute empowered the Court to give. The case of *Regina v. The Justices of Merionethshire* (a) was referred to in support of the application. Some of the justices expressed their intention of adhering to their general rule as to costs, upon which a discussion ensued. The justices then conferred together, and the chairman pronounced their decision as follows:—"order quashed, with 40s. costs." The affidavit stated that the quarter sessions did not take into consideration the amount of the expenses actually incurred, but, as the deponent believed, adhered to its general rule of awarding 40s. costs only in cases of appeals.

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The affidavit in answer merely shewed that the question as to the pauper's settlement, was one of considerable doubt and difficulty.

Archbold and *Groves* shewed cause. They referred to *Regina v. Justices of Merionethshire* and contended that the sessions had exercised their discretion in awarding 40s. costs in this particular case.

Pashley, in support of the rule, was not called upon.

COLERIDGE, J.—It seems to me that this rule must be made absolute. The question turns on the simple fact, whether the justices have considered the appellants' claim for costs in this particular case, and exercised their discretion respecting it. The evidence seems to me to be all one way, and no answer is attempted on the affidavits in opposition to the rule. It is shewn that there is a rule at these sessions, that where an order of removal is quashed upon appeal, no more costs than 40s. shall be allowed; that on the present occasion there was a debate amongst the magistrates, whether they should adhere to this rule in this

(a) 6 Q. B. 163.

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particular instance ; and that, finally, (the effect of what is stated seems to me to be), they did resolve to adhere to their rule, and to give only 40s. costs. I think, therefore, that they have not considered the question of costs as they were bound to do. The mandamus must, therefore, issue, and the justices will no doubt, in obedience to it, exercise a fair and honest discretion, in awarding to the appellants such costs as they shall think them entitled to. No inconvenience can arise from this decision ; for if the justices, in fact, have exercised a discretion as to the costs in this case, they can make a return, and state that they have considered that matter.

Rule absolute.

May 7.

DIXIE v. ALEXANDRE.

[In the Exchequer of Pleas.

Coram Alderson, B., sitting alone.]

Where an arbitrator finds the amount of the costs of an award, it is not necessary that they should be taxed by the Master, previously to the Court ordering them to be paid.

A RULE had been obtained, calling on the defendant to shew cause why he should not pay to the plaintiff three several sums: first, 50*l.*, directed by an award to be paid by the defendant to the plaintiff; secondly, 36*l.* 16*s.* 2*d.*, the costs of the reference ; and thirdly, 19*l.* 10*s.*, the costs of the award.

The costs of the reference had been taxed by the Master, and his allocatur had been made ; but the costs of the award had not been taxed, and were not included in the allocatur. The award was made under a reference by order of nisi prius, which directed that the costs of the reference and award should be in the discretion of the arbitrator. The arbitrator by his award, after directing that the defendant

should pay to the plaintiff the sum of 50*L.*, and should pay the costs of the reference, ordered as follows: "Lastly, I order and award that the costs of this award be borne and paid by the defendant, which said costs I do assess at the sum of 19*L.* 10*s.*, which shall be paid in the first instance by the party taking up the award; and if the plaintiff shall take up the award, then that the said sum shall hereafter on demand be repaid to him by the defendant." The plaintiff afterwards took up the award.

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W. Henderson shewed cause. The Court will not make the present rule absolute; as the costs of the award, that is, the arbitrator's fees, &c., have not been taxed or included in the Master's allocatur. [*Alderson*, B.—The compulsory power is in the award itself, and not in the allocatur.] The proper method of proceeding, then, is by attachment, as in *Hicks v. Richardson* (a). The costs ought to be taxed, as they might be unreasonable; they clearly are taxable; *Fitzgerald v. Graves* (b).

G. Hayes, in support of the rule. The only cases in which the Court will direct arbitrator's fees to be taxed are where it is suggested that they are unreasonable.

ALDERSON, B.—There is no doubt as to the first sum. As to the second, the costs of the reference, those have been taxed by the Master, and an allocatur made. Then there remains the third sum, the costs of the award; and it appears that the arbitrator has awarded that they are to be borne by the defendant, and paid by the party taking up the award; and that if the plaintiff takes up the award, he is to be repaid by the defendant. Is it then necessary that they should be referred to the Master before the Court orders them to be paid? I think not. If the defendant when

(a) 1 B. & P. 93.

(b) 5 Taunt. 342.

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informed of the amount, thinks it unreasonable, he should then apply to the Court to have them referred to the Master to be taxed, in the same way as any other costs.

Rule absolute (a).

(a) See the next case.

April 25,
May 8.

THIRELFALL v. FANSHAWE.

[*Bail Court. Coram Coleridge, J.*]

An order of reference directed that the costs of the award should be in the discretion of the arbitrator. The arbitrator awarded that the costs of the award should be borne by the defendant, "which said costs" "I do assess at the sum of 39*l.* 17*s.* 4*d.*" It appeared that part of that sum was the amount of

A RULE had been obtained by the plaintiff in Hilary Term last, calling upon the defendant to shew cause why a writ of attachment should not issue against him for his contempt in not paying the sum of 39*l.* 17*s.* 4*d.*, pursuant to an order of reference, which had been made a rule of Court, and an award.

By a Judge's order, dated the 30th of July, 1849, and made by consent, in an action of trespass between the above parties, after reciting that certain disputes had arisen between the parties, concerning the true boundary line between their properties, it was ordered that those disputes should be referred to the award of W. T., "and that the costs of the said award should be in the discretion of the said arbitrator."

The arbitrator made his award on the 31st of October, by

charges of an attorney, whom the arbitrator, who was a layman, had employed to assist him in taking the evidence and drawing up the award. The plaintiff took up the award, and afterwards demanded payment of the 39*l.* 17*s.* 4*d.* of the defendant, who refused to pay it. On motion for an attachment against the defendant, *Held*, that the arbitrator had power in the first instance to name the sum to be paid for the costs of the award; and that if the defendant did not proceed with due diligence to procure a taxation, and insist on the necessity of it, he could not set up the want of taxation as a ground for opposing an attachment for non-payment. *Held* also, that as the arbitrator was a layman, his employment of an attorney was reasonable; but that, at all events, as the defendant had not objected during the reference to the employment, he must be taken to have assented to it.

Held also, that the payment of the costs of the award by the plaintiff to the arbitrator sufficiently appeared, although not sworn to on the affidavits, from a correspondence between the parties, in which the payment was assumed on both sides, and not disputed by the defendant, and also from the fact that the plaintiff had taken up the award.

which, after awarding concerning the boundaries, which were set out with great particularity, he ordered thus: "I do further award," &c., "that the costs of this award shall be borne and paid by the said Thomas Lewis Fanshawe; which said costs of the said award I do assess at the sum of 39*l.* 17*s.* 4*d.*"

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The present rule was obtained upon reading the rule making the order of reference a rule of Court, and upon affidavits of the due execution of the award, and of the demand of the sum mentioned; but there was no express statement that the plaintiff had paid the arbitrator the amount of his costs. The demand was made on the 1st of January, 1850; but it appeared upon the affidavits in opposition to the rule, that the defendants had notice of the award and its contents immediately after it was made.

The affidavits in opposition to the rule, stated the following facts:—The arbitrator was a layman, and employed an attorney to act as his professional adviser, to take down the evidence of the witnesses, and to draw up the award. The sum of 16*l.* 16*s.* 3*d.*, being part of the sum of 39*l.* 17*s.* 4*d.*, was the amount of the attorney's bill of costs, which had not been taxed. A copy of the bill of costs was annexed to the affidavit, and it contained charges for obtaining and serving or sending notices or appointments of the arbitrator's intention to proceed on the reference, which it was alleged were usually and properly given, not by the arbitrator himself, but by one of the parties to the reference. The affidavits also shewed that the arbitration occupied two days and a part of a third, lasting about five hours on each of the two first days, and about two hours on the third. The defendant was not represented by any counsel or attorney, but only by his land agent, on account, as it was sworn, of the value of the land in dispute being of a trifling amount. Nine witnesses were examined on the part of the plaintiff, and five on the part of the defendant. They were principally herdsmen or shepherds, and were called to prove acts of ownership

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exercised over the lands in question by the respective parties, or by those who preceded them in the possession of their respective estates. The affidavits set out a correspondence before the rule nisi was obtained between the attornies of either party, throughout which it was assumed, though not expressly stated, that the plaintiff had taken up the award and paid the full amount of the costs as found by the arbitrator.

W. H. Watson shewed cause. The arbitrator had no power to award the amount to be paid to himself. It is contrary to common justice that he should do so. Moreover, part of the sum charged is a bill of costs for his attorney, and he can have no right to tax the charges in that bill, which is the business of the proper taxing officer of this Court. The affidavits on behalf of the defendant shew that the sum demanded is excessive; and there are items in the bill of costs, such as obtaining and serving or sending notices or appointments of the arbitrator's intention to proceed with the reference, which no taxing officer would allow. The case of *Bates v. Townley* (a) shews, that where a lay arbitrator is employed, he is only entitled to a reasonable compensation. In the case of *Combes and Freshfield, Trustees of the Globe Insurance Company and Fearnley* (b), in Hilary Term last, the question of how far an arbitrator was the sole judge of the amount of the fee to which he was entitled, was much discussed in the Court of Exchequer; and that Court seemed to be of opinion that he had no such right. In *Robinson v. Henderson* (c), the arbitrators had awarded a sum of money to

(a) 2 Exch. 152.

(b) 11th January, 1850. *Watson* shewed cause. No decision was ultimately come to in the case, as *J. Henderson*, who appeared for the umpire, consented to refer the amount demanded to one of the Masters of the

Court to be taxed. The rule was to set aside the award, or so much of it as related to the disputed sum, unless the opposite party and the umpire would consent to refer the amount to the Master for taxation.

(c) 6 M. & S. 276.

be paid to themselves for their fees, and the Court set aside the award. In *George v. Lousley* (a), the arbitrators had directed a certain sum to be paid for their own expenses, and it seems to have been conceded, upon argument, that the award could not be supported as to that part. [*Coleridge, J.*—Suppose the sum 16*l.* 16*s.* 3*d.* were deducted from the amount awarded; would you say that the award would not be good for the remainder?] Yes. In *Miller v. Rohe* (b), a rule was obtained to set aside an award, on the ground, amongst others, that the sum awarded by the arbitrators to be paid to themselves was excessive; and although the Court discharged the rule upon the other grounds, they directed the prothonotary to inquire what was a reasonable sum to pay the arbitrators for making their award, and that the sum should be reduced accordingly. In a subsequent case of *Fitzgerald v. Graves* (c), the arbitrator had awarded a certain sum to be paid to himself for his arbitration fee, which was paid in the first instance by the plaintiff, in whose favour the award was made, but the costs were ultimately to be paid by the defendants. In taxing the costs in the cause, the defendants objected to this item; but the prothonotary, finding that it had been awarded, refused to inquire into the reasonableness of the amount; the Court, however, upon appeal directed him to review the taxation. *Heath, J.*, there says, “it cannot be, that it is in the power of the arbitrator to fix the amount of what shall be paid to himself without any control over it: that would be making him a judge in his own cause. We do not go into the reasonableness of this charge, but we object to the principle that it is not examinable.” In *Musselbrook v. Dunkin* (d), a rule to refer an arbitrator’s charges to the prothonotary for taxation was made absolute by the Court of Common Pleas, the arbi-

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(a) 8 East, 13.

(b) 3 Taunt. 461.

(c) 5 Taunt. 342, 3.

(d) 9 Bing. 605; S. C. 2 M.

& Scott, 740; 1 Dowl. 722. But see *Dossett v. Gingell*, 2 M. & G. 870; S. C. 3 Scott, N. R. 179.

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trator refusing to deliver his award, until his charges, which were exorbitant, were paid. All that the defendant is liable to pay is a reasonable remuneration to the arbitrator. If the plaintiff has paid more, he has paid it in his own wrong, and cannot recover it from the defendant. The reasonableness of the remuneration must be ascertained by taxation. Till the taxation, there is no ascertained sum, and the demand on which to found an attachment for contempt must be of a fixed sum. On tender of a reasonable sum to the arbitrator, trover probably would lie for the award; or if the plaintiff wished at once to get possession of it, he might apply to the Court to have the charges taxed; or if he paid the sum under protest, he might recover back the excess in an action for money had and received. He cannot, however, if he pays an unreasonable sum, come to this Court and ask for an attachment against the opposite party for refusing to repay it.

Another answer to the present application is, that there has been no proper demand, for it is not shewn upon the affidavits that the plaintiff has paid the arbitrator these costs (*a*).

F. Robinson, in support of the rule. The course which the defendant ought, to have pursued, if he disputed the reasonableness of the arbitrator's charges, was that pointed out in *Fitzgerald v. Graves* (*b*), namely, to have the costs, including the arbitrator's charges, taxed. But he cannot lie by till a demand is made upon him and an attachment moved for, and then suggest in answer that the charges are unreasonable. It is not contended that the arbitrator alone has the power to fix the amount of the charges to be paid to him; but it is submitted that when he has fixed them,

(*a*) Another objection was taken to the form of the demand, which was of a sum "awarded to the plaintiff by the said W. J.," &c., "for the costs awarded

to the above named plaintiff;" but as no judgment was given upon this point, the argument is omitted.

(*b*) 5 Taunt. 342.

they must be taken to be, *primâ facie*, such as he is entitled to. No material distinction can be made between his power to fix the amount of his charges, and to fix the costs of the action; and formerly it was held, that he was bound to assess the costs of the action, when left in his discretion by the terms of the reference; *Shephard v. Brand* (a); *Winter v. Garlick* (b). In *Robinson v. Henderson* (c), the objection was not so much that the arbitrators had awarded the amount of their own fees, as that they had not fixed how much of the sum awarded was to be paid to them, and how much to other parties. The decision in *George v. Lousley* (d), proceeded on a ground not applicable to the present case; for there the arbitrators had no power under the submission over the costs of the award. The cases of *Miller v. Robe* (e) and *Fitzgerald v. Graves*, tend to shew that the proper course to be taken by the party dissatisfied with the amount fixed, is to apply to have the charges taxed. As to the objection that part of the sum is for the expenses of an attorney employed by the arbitrator to assist him in taking the evidence and drawing up the award, there is no case that shews that an arbitrator, who is a layman, is not justified in employing professional assistance in the conduct of the arbitration; particularly as it is clearly for the benefit of both parties that he should do so.

With regard to the objection as to the demand, the case of *Hicks v. Richardson* (f) is an authority, that where by an award each party is to pay a moiety of the costs of the arbitration, and one party, in order to get the award out of the arbitrator's hands, pays the whole, he may have an attachment against the other, upon refusal to pay his proportion. That shews that the payment by A. to the

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(a) Ca. temp. Hardw. 53. See also Anon. 1 Chit. Rep. 38.

(b) 1 Salk. 65; S. C. 6 Mod. 195.

(c) 6 M. & S. 276.

(d) 8 East, 13.

(e) 3 Taunt. 461

(f) 1 B. & P. 93. See also *Grove v. Cox*, 1 Taunt. 165; *Stokes v. Lewis*, 2 Smith, 12.

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arbitrator is equivalent to an award by the latter that B. should repay A. the sum so paid. A long correspondence between the parties is set out on the affidavits in answer to this rule, and throughout the whole, it is taken as admitted that the plaintiff has paid the arbitrator. Indeed his being in possession of the award is presumptive proof that he has done so.

Cur. adv. vult.

COLERIDGE, J.—This was a rule for an attachment for non-payment of the sum of 39*l*. 17*s*. 4*d*. directed to be paid by an award.

The plaintiff and defendant had disputed about the boundary of their estates, and referred the question to an arbitrator, not a lawyer. By the order of reference, the costs of the award were to be “in the discretion of the arbitrator.” He had made his award on the matter referred, and with regard to the costs had said in it, “I do further award,” &c. “that the costs of this award shall be borne and paid by the said Thomas Lewis Fanshawe, which said costs,” &c. “I do assess at the sum of 39*l*. 17*s*. 4*d*.” These costs had been paid by the plaintiff in the first instance in taking up the award, and had afterwards been duly demanded by him of the defendant.

Upon cause shewn it was objected, first, that an arbitrator cannot assess his own charges; but this cannot be maintained, in the sense that he cannot in the first instance name the amount, and require payment, before delivery of the award. The practice on this point is well established and convenient; it leaves untouched the consideration of cases of excessive charges, and what remedies may be had before or after payment. Nothing stated in the affidavits takes this out of the common rule.

Secondly. It was said, that even if the arbitrator could in the first instance name the sum to be paid, the demand was always open to taxation; and, therefore, that no attachment could lie before taxation, because until then there

was no ascertained sum. But no case has yet decided that an arbitrator's charges are, even as between the parties, referable to taxation in all instances and as a matter of course. At all events the party, on whom the demand is made, should proceed with diligence to procure a taxation, and insist on the necessity of it. If he does not do so, it would be unjust to allow the want of a taxation to be set up as a ground for opposing an attachment for non-payment. No such step appears to have been taken by the defendant. He has ascertained from the plaintiff's attorney that the charge is divisible into two parts: 23*l.* 1*s.* 1*d.*, being the amount charged by the arbitrator for his individual labour and loss of time; and 16*l.* 16*s.* 3*d.* being charged for the attendance of his attorney, who appears to have conducted the examination of the witnesses and assisted the arbitrator in framing the award. The defendant's principal objection is stated to have been to this latter charge. Where, however, parties appoint a lay arbitrator, if the reference is to be brought to a safe conclusion, it is almost of necessity that he should have professional assistance in the conduct of it, and in framing the award. And as the defendant was present at the hearing by one who represented him, I must take him to have assented to what was so reasonable, and so much for his own interest. If so, he cannot object to that item swelling the amount he has to pay.

Lastly. It is said that it is not directly sworn that the plaintiff has paid the arbitrator the amount of his charges. But the plaintiff has taken up the award, which is a strong presumption of payment, and the correspondence stated in the affidavits is carried on upon the footing of its having been made,—the defendant not suggesting a doubt on the subject in any portion of it. I think the want of an express assertion in the affidavits not sufficient, under these circumstances, to prevent the rule from being made absolute.

Rule absolute (*a*).

(*a*) See *Dixie v. Alexandre*, ante, p. 338.

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JOHNSON v. LATHAM.

[*Bail Court. Coram Coleridge, J.*]

By a rule of reference, the action, which was brought by one weir proprietor against another, for disturbance of a weir, was referred to an arbitrator, who was to have full power to determine, and also to define and for ever set at rest all disputes, quarrels, and controversies, touching all manner of rights of "depths of weirs" and other water privileges. The arbitrator by his award, after disposing of the action, recited that differences had arisen between

A RULE had been obtained in last Hilary Term, calling upon the plaintiff to shew cause why he should not pay to the defendant the sum of 172*l.*, being the balance of costs pursuant to an award.

It appeared that by a rule of Court dated the 12th of June, 1847, which recited a former rule of reference, it was ordered that the award made under the last mentioned rule should be set aside by consent, and "that this cause," which was an action on the case for disturbance of the plaintiff's weir, "and all matters in difference in anywise relating thereto between the parties, be referred to the award of," &c. It was also ordered that the "arbitrator, if he shall think fit, shall have full power and authority" "to inquire into and determine, and also to ascertain, define, adjust, and for ever set at rest all trespasses, disputes, quarrels, and controversies touching and concerning all and all manner of rights of water heights or depths of weir, and other water privileges, and all other matters and things arising out of or in reference to the said premises, and to the disputes between the said parties connected with the said premises,

the parties touching the depth of the defendant's weir, and the depth at which he was entitled to keep the same; and awarded that the defendant was "entitled to keep and maintain his said weir of the *depth* of fourteen inches:" *Held* sufficiently certain.

The award further directed, that "for the purpose of defining, denoting, and perpetuating the limit of the said depth," &c., that within one month, &c., "such durable marks and erections be placed on the land adjoining to the said weir, as D. B., of," &c., "may direct, as being the best adapted for so defining, denoting, and perpetuating the limit of the said depth of fourteen inches." *Held* bad, as being a delegation of the discretion vested in him by the reference; and *Seemle*, that this portion of the award could not be separated from the rest, and be rejected as surplusage.

The rule of reference contained a clause "that in the event of any application being made to this Court on the subject of the said award," the Court should have power to remit the matter back to the arbitrator for re-consideration: *Held*, that a rule for payment of money under the award was "an application" "on the subject of the said award" within the above clause, and empowered the Court to remit the matters back to the arbitrator.

or otherwise in relation thereto, both as regards matters at law and matters of fact." Power was also given to divert the water of the weir in order to ascertain the state of the weir; and it was ordered "that the said arbitrator shall be and is hereby fully authorized to direct and order to be erected, put up and placed, and for ever thereafter to be kept in repair, or to be pulled down, levelled, and finally abolished, all or any erections or buildings, whether of stone or brick, wood, or other materials in or about the said weir of the said defendant, or other the premises, at the expense of such party or parties, at such time and under such penalty or penalties in case of disobedience as he the said arbitrator may think proper." The costs of the cause were to abide the event of the reference, and the costs of the reference and award to be in the discretion of the arbitrator. The order contained, besides the usual clauses, a provision "that in the event of any application being made to this Court on the subject of the said award to be made as aforesaid, this Court, if it see fit, shall have the power to send the matters, any or either of them, back to the said arbitrator for his re-consideration and determination."

The award, which was dated the 8th of June, 1849, after reciting the order of reference, and finding the substantial issues in the cause for the defendant, (respecting which part of the award no objection was made), and ordering that the costs of the reference and award should be borne by the plaintiff, proceeded thus: "And whereas differences have arisen between the said parties, and may hereafter again arise between them, touching a matter relating to the said cause, that is to say, touching the depth of the defendant's said weir, and the depth at which he is entitled to keep the same: now, in order to adjust and for ever set at rest all such differences, I do further award, order, and determine that the defendant is entitled to keep and maintain his said weir of the depth of fourteen inches, and no more. And I do further award," &c., "for the purpose of defining, denoting, and perpetuating the limit of the said

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depth at which the defendant is so entitled to keep and maintain his said weir as aforesaid, that within one calendar month from the date of this my award, such durable marks and erections be placed on the land adjoining to the said weir, as Mr. David Bellhouse, of Manchester, surveyor, may direct, as being the best adapted for so defining, denoting, and perpetuating the limit of the said depth of fourteen inches; the said marks and erections to be so placed as aforesaid, and to be for ever hereafter kept in repair and maintained at the cost of the defendant."

Affidavits in support of the rule were made by surveyors and parties connected with neighbouring water mills, shewing that the meaning of that part of the award which declared that the defendant was "entitled to keep and maintain his said weir of the depth of fourteen inches," was intelligible and clear, and that persons acquainted with weirs would understand at once the precise depth at which the weir was to be kept; and an affidavit by Mr. Bellhouse stated that "the said depth of fourteen inches and no more, at which the said defendant is entitled to keep and maintain his said weir as aforesaid, means fourteen inches fall of water, computing from the level of the said defendant's weir to the level of the water immediately below the said weir."

Affidavits in opposition to the rule, were made by an engineer and others, stating that the award was ambiguous and uncertain, and did not define the rights of the parties. The engineer in particular stated that he had surveyed the ground, and that he could not understand the expression of the "depth of fourteen inches and no more;" for that if the depth was to be computed from the level of the water flowing over the said weir, it was continually changing according to the quantity or volume of water current in the river, which, on the occasion of his survey, altered to the extent of two and half inches.

W. H. Watson and *T. Jones* now shewed cause. The award is bad on two grounds: for want of certainty,

and for want of finality. It is uncertain in awarding that the defendant is entitled to keep his weir "of the depth of fourteen inches and no more," without specifying from what level the depth is to be taken. On a motion of this kind, no objection can in strictness be taken which does not appear on the face of the award; *M'Arthur v. Campbell* (a); but as the defendant has anticipated the objection by producing affidavits to shew that the award is certain, the plaintiff's affidavits may be looked at in answer; and it will be seen, that in the opinion of scientific men, the words "the depth of fourteen inches and no more," are unintelligible. But even if the affidavits are to be rejected, and the award alone looked at, the words must be taken to bear their ordinary construction. They would mean a depth of fourteen inches from the level of the water passing over the weir, and then the direction is clearly uncertain, as it is obvious that the depth of water on the weir must be continually changing, according to the volume of water in the river.

Next, as to the award not being final, it is submitted that the direction that Bellhouse should erect marks "for the purpose of defining, denoting, and perpetuating the limit of the said depth," is a delegation of authority by the arbitrator which renders the award bad. The "defining" and "for ever setting at rest" the controversies, &c., touching the rights of "depths of weir," is one of the matters expressly submitted to the arbitrator by the order of reference, and was one of the matters in dispute before him. In *Stonehewer v. Farrar* (b), Mr. Justice Patteson, in giving judgment, says, "no case decides that, where an arbitrator has power, and in the exercise of it gives a faulty direction, that part of the award may be struck out and the rest preserved." The rule to be collected from the cases cited in the notes to 2 *Wms. Saund.* 293, 6th ed.,

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(a) 2 A. & E. 52; S. C. 4 N. & M. 208.

(b) 6 Q. B. 730, 743.

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is, that if the award is faulty with respect to a point on which the parties had a right to expect the decision of the arbitrator, the bad part cannot be severed from the good, and the rest of the award be left standing. Perhaps the correct rule is, that if the defective part embraces a matter within the authority of the arbitrator, it cannot be separated from the rest of the award. In this respect, the case is distinguishable from that of *Manser v. Heaven* (a), where the bad portion of the award was touching a matter not submitted, namely, future disputes. In *Russell on Awards*, p. 271, it is said, "an arbitrator cannot in his award reserve either to himself or delegate to another, the power of performing in future any act of a judicial nature respecting the matters submitted." If the delegation of authority were purely ministerial, it might not be open to objection; but here that is clearly not so. If Bellhouse had died before "directing" the marks to be placed for the purpose of "defining" "the depth of the weir;" could any award be said to have been made? The Court will, perhaps, be asked to remit the matter back to the arbitrator; but it is submitted that it has no power to do so under the terms of the clause for that purpose contained in the submission. It is only "in the event of any application being made to this Court on the subject of the said award," &c., that power is given to this Court to send the matter back for the arbitrator's re-consideration. This is plainly not such an application as is there referred to.

Martin and *Welsby* (with whom was *Whitmore*) in support of the rule. The award is sufficiently certain. The words, that the defendant is entitled "to keep" "his said weir of the depth of fourteen inches and no more," are perfectly clear and intelligible to parties accustomed to the use of water power and the management of weirs. There is only one way of measuring the depth of a weir, which is from

(a) 3 B. & Ad. 295.

the level of the water above the weir to the level of the water below the weir, and that is the depth of the weir. Of course, the bed of the river may vary with sudden floods or long drought, but the measurement, to be fair, must be taken during an average state of the river.

As regards the objection of want of finality, the power delegated here was merely to perform a ministerial act, namely, to direct that such durable marks should be placed as should effectually shew for the future the depth of fourteen inches, at which the arbitrator had determined the defendant's weir was to be maintained; and it is clear that the arbitrator may delegate his power to perform a purely ministerial act. All the cases on this subject will be found collected in *Russell on Awards*, p. 206. It is there said, "a distinction has been taken between a judicial and a ministerial act, and it seems clear that an arbitrator may delegate to another the performance of acts of a ministerial character only. It is not always easy to ascertain what acts are included under the head of ministerial acts. The measurement of the number of acres in a field, or the surface of a lake, has been so considered." For the latter position, the case of *Thorp v. Cole* (a) is referred to. At any rate, *Manser v. Heaver* (b) establishes that where there is an excess of authority in the award which may be struck out, and leave a good award standing, the bad part will not vitiate the good. Should, however, the Court be of opinion that the award is bad, the words in the deed of submission give it power to remit the matter back to the arbitrator; this being clearly "an application" "on the subject of the award."

Cur. adv. vult.

COLERIDGE, J.—In shewing cause in this case against a rule for the payment of money under an award, two points

(a) 2 C., M. & R. 367; S. C. 4 Dowl. 457. (b) 3 B. & Ad. 295.

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were made: first, that the award was uncertain, and secondly, not final.

It appears that the arbitrator had power to inquire into and determine, and also to ascertain, define, adjust, and for ever set at rest all disputes touching all manner of *rights of water heights or depths of weir*. The award recites that differences had arisen, and might thereafter again arise touching the depth of the defendant's weir, and the depth at which he was entitled to keep the same; and then proceeds to award, in order to determine and for ever set at rest all such differences, that "*the defendant is entitled to keep and maintain his said weir of the depth of fourteen inches and no more.*" This is said to be uncertain, because it is not stated from or to what point the depth is to be measured; but the recital speaks familiarly of water heights and weir depths as terms, the meaning of which was known; and in certain districts where water power is much in use, the language of this award may be not only sufficient, but the most proper that could be used. Terms of art, (and this seems to fall within that category), will require explanation to those who are not familiar with the subject; and yet they are the most certain that can be used, and convey the idea for which they stand, more clearly to the minds of those who are, than any description could. The arbitrator in this place, moreover, is not directing the erection of a new weir, he speaks of differences which have arisen and may arise touching the depth of an existing weir, and the depth at which the defendant is entitled to keep it, and the award that he may keep it "of the depth of fourteen inches and no more," must be construed with reference to all the existing circumstances known to both parties at the time. So understood, it seems to me that there is no uncertainty, any more than if an award had directed that a wall might be kept ten feet high, or a well sunk fifty feet deep; whatever difficulty there may be, arises not from the uncertainty of the language, or the insufficiency of the description; but from the subject-matter

being less familiar to common readers, for whom the award is not intended.

The award then proceeds thus :—“I further award and order for the purpose of defining, denoting and perpetuating the limit of the said depth, at which the defendant is so entitled to keep and maintain his said weir, that within one calendar month from the date of this my award, such durable marks and erections be placed on the land adjoining to the said weir, as Mr. David Bellhouse, of Manchester, Surveyor, may direct, as being best adapted for so defining, denoting and perpetuating the limit of the depth of fourteen inches, the said marks and erections to be so placed as aforesaid, and to be for ever hereafter kept in repair and maintained at the cost of the defendant.” It was objected that this is not final, as it delegates the arbitrator’s powers to Mr. Bellhouse, and leaves something to be done by him after the award made, and the functions of the arbitrator at an end. By the recital of the award, it appears that the arbitrator had power “to direct and order to be erected, and for ever thereafter to be kept in repair, all or any erections in and about the defendant’s weir, at the expense of such party, and at such time as he might think proper.” But although this might enable him to make an order to be executed at a future period, yet his mind was to determine what erections would be proper, and the submission did not allow him to delegate that discretion to another. This objection therefore is sustained, and I have great doubts whether this defective part can be separated from the rest, for the consideration for the submission was not merely the settlement of the existing difference, but the “for ever setting at rest all disputes touching the rights of water heights, or depths of weir;” and it may be said that the direction now under consideration was the provision by which this latter object is to be effected. The arbitrator himself seems so to have considered it; for he gives the direction “for the purpose of

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defining, denoting and perpetuating the limit," the effect of which is intended to be the setting at rest disputes in all future times touching the right. The marks and erections to be set up will be always to be appealed to on the spot, unchangeable and preventing controversy. If it be said that the limit of fourteen inches will effect the same purpose, still both parties are on the face of the submission agreed that more may be necessary, and the arbitrator by his conduct has shewn that he was of that opinion; and if it be only an additional and convenient safeguard, the plaintiff is entitled to have it secured to him.

The award therefore cannot stand in its present shape; and it was said I could not remit it to the arbitrator, because no complaint was made against it. But the power to remit "the matters, any or either of them, back to the arbitrator for his re-consideration and determination," is given "*in the event of any application being made to the Court on the subject of the award.*" These are large words and not necessarily limited to the case of a motion to set the award aside; and I am not disposed to construe narrowly the language in which so wholesome a power is conferred. The present is undoubtedly "an application" "on the subject of the award." Let, therefore, this rule stand discharged; and let it be remitted to the arbitrator to re-consider the prospective directions which he has given for the purpose of defining, denoting and perpetuating the limit of the depth at which the defendant is entitled to keep and maintain his weir.

Rule accordingly.



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Ex parte RICE JONES.

May 7, 8.

[*Bail Court. Coram Coleridge, J.*]

THIS was a rule calling upon the Rev. Evan Evans, clerk, and William Parry Yale, Esq., two justices of the peace for the county of Denbigh, and on Mary Evans, to shew cause why a writ of certiorari should not issue to remove into this Court a certain order made on the 4th day of December last, under the hands and seals of the said Evan Evans and William Parry Yale as such justices as aforesaid, whereby the said Rice Jones was adjudged to be the putative father of a bastard child of which the said Mary Evans had then lately been delivered, and ordering the said Rice Jones to pay to the said Mary Evans, or other person in the said order mentioned, certain sums of money in the said order specified.

The order was in the following terms:—

“Denbighshire, to wit. At a petty sessions of,” &c., “held” “on the 4th of December, 1849, before us,” &c. [The order here set out the application for the summons by the mother of the child, on the 6th of November, 1849; the issuing the summons, in the form prescribed in 8 & 9 Vict. c. 10, schedule No. 8; and then proceeded thus:] “And whereas the said Rice Jones having been duly served with the said summons within forty days from this day, to wit, on the 8th day of November last, and not appearing in pursuance thereof, and the said Mary Evans having now applied to us the justices in petty session assembled for an

The jurisdiction of the petty sessions to make an order of affiliation and maintenance under the 7 & 8 Vict. c. 101, s. 3, where the putative father does not appear before them, only attaches “on proof” that the summons was left at his “last” place of abode.

The word “last” in that section means the present place of abode, if the party have any; the last which he had, if he has ceased to have any.

Although the justices have jurisdiction to make an order “on proof” that the summons has been duly served; yet, if it can be afterwards shewn to this

Court that in point of fact the summons was not duly served, this Court will grant a certiorari to bring up the order into this Court for the purpose of being quashed.

An order of affiliation, bearing date the 4th of December, and made in the absence of the putative father, recited, “whereas the said R. J., having been duly served with the said summons within forty days from this day, to wit, on the 8th day of November last, and not appearing in pursuance thereof;” but omitted the words in the directions to the form given in the 8 & 9 Vict. c. 10, Schedule No. 8, “and six days at least before this day, as is now proved before us:” *Scmble*, that the order was bad.

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order upon the said Rice Jones, according to the form of the statute in such case made and provided; and it being now proved to us that the said child was, since the passing of an act passed" &c. (the 8 & 9 Vict. c. 10), "that is to say, on the 19th day of December, A. D. 1848, born a bastard of the body of the said Mary Jones; and we having heard the evidence of such woman, and such other evidence as she hath produced, and the evidence of the said Mary Evans, the mother of the said child, having been corroborated in some material particular by other testimony to our satisfaction, do hereby adjudge," &c. [The order then proceeded to adjudge Jones to be the putative father of the child, and to direct the payment of a weekly sum for its maintenance, and for the expenses, in the usual form.]

The affidavit of Rice Jones, in support of the rule, stated that the order was served on him on or about the 15th of December; "that the summons mentioned and referred to in the said order, and therein stated to have been duly served on him this deponent, was not personally served on him this deponent, but was left at a house situate in Prince Edwin's Lane, in Liverpool aforesaid, where he this deponent formerly lodged; but he this deponent did not, at the time that the said summons was left as aforesaid, lodge there, but at a house situate in Yate Street, in Liverpool aforesaid, and by reason of the said summons not having been left at his said last place of residence, he this deponent did not receive the same until after the day on which the said order was made as aforesaid."

The affidavit in answer was made by the constable who served the summons. He stated, "that deponent did, on the 8th day of November, A. D. 1849, serve a true copy of the summons hereunto annexed," &c., "upon Rice Jones, of 25, Prince Edwin's Lane, Liverpool, in the county of Lancaster, by leaving the same at the dwelling-house of Mrs. Parry, No. 25, Prince Edwin's Lane aforesaid, with whom the said Rice Jones then lodged as this deponent verily believes, inasmuch as the said Mrs.

Parry, in answer to this deponent's inquiries, informed deponent that the said Rice Jones resided there, and that all his clothes were there with her, but that the said Rice Jones had not been there the day previously. That the said dwelling-house was the only place of abode of the said Rice Jones known to deponent, and that upon inquiries made in Liverpool aforesaid, deponent had no doubt that the said Rice Jones has no other place of abode there or elsewhere, save as before mentioned. That on the 4th day of December, A. D. 1849, at a petty session of her Majesty's justices of the peace for the county of Denbigh, holden in and for the division of Yale in the said county, deponent did prove before William Parry Yale, Esq., and the Rev. Evan Evans, clerk, two of her Majesty's justices of the peace for the said county, that he had served the said Rice Jones with a true copy of the said summons in the manner and on the day aforesaid."

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Macnamara shewed cause. This rule is moved on two grounds: first, that the order is bad on the face of it, and, secondly, that there was no sufficient service of the summons on the putative father. As to the first ground, the order, it is true, does not follow the form given in the schedule No. 8 to the 8 & 9 Vict. c. 10, where, after the words "and whereas the said having been duly served with the said summons within forty days from this day," note (*d*) directs,—“if the defendant do not appear, insert here ‘and six days at least before this day, as is now proved before us,’” &c. But the date of the service is stated, viz., “the 8th of November;” and as the order is made on the 4th of December, it is clear that the proper period of time had elapsed. The 8 & 9 Vict. c. 10, s. 1, says, that proceedings under the act, “set forth according to the forms in the schedule hereunto annexed, or to the like tenor or effect,” shall be taken “to be valid and sufficient in law.” Here it is to the like tenor and effect, and the circumstance that the date is laid under a videlicet is immaterial; 2 *Wms. Saund.* 290 c,

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note (1), 6th ed. “Where a videlicet contains that which is material and necessary to be alleged, it is considered as a direct and positive affirmation or averment, which is material and traversable;” 2 *Wms. Saund.* 291 *a*, note (*a*), 6th ed. To the same effect are the cases of *Skinner v. Andrews* (*a*), and *Ryalls v. Bramall* (*b*). [*Coleridge, J.*—The rule as regards pleading will not be disputed.] In *Rex v. Baines* (*c*), it was argued that the rule applied equally to orders of justices. At any rate, the Court has power under a recent statute, the 12 & 13 Vict. c. 45, s. 7, to amend a defect like the present. [*Coleridge, J.*—That statute applies only to omissions and mistakes in orders, where this Court is satisfied “that sufficient grounds were in proof before the justices” “making such order,” &c. Here the defendant says, not only was I not served with the summons, but I had no knowledge of the proceedings till after the order was made.]

As to the second ground, it is submitted that the service of the summons was sufficient. The statute 7 & 8 Vict. c. 101, s. 3, says, that “on proof that the summons was duly served on such person, or left at his last place of abode,” &c., the justices may hear the evidence of the woman and make the order. The Legislature must have meant by the word “last” place of abode, the last place in which the party was known to have resided. If they had meant the place in which he was actually living, they no doubt would have used different language. Whether the “proof” offered of the service was sufficient or not, was for the justices alone to decide; and this Court will not review their decision. [He referred on this point to *In re Zohrab and Smith* (*d*).]

Greaves in support of the rule. It may be conceded that the order need not be in the exact form prescribed in

(*a*) 1 *Wms. Saund.* 169.

(*c*) 2 *Ld. Raym.* 1265; *S. C.*

(*b*) 5 *D. & L.* 753; *S. C.* 1

Salk. 680; 6 *Mod.* 192.

Exch. 734. See also *Nash v.*

(*d*) 5 *D. & L.* 635.

Brown, 6 *D. & L.* 329.

the schedule No. 8 to the 8 & 9 Vict. c. 10, and that it is sufficient if it is "to the like tenor or effect." Here, however, the words "as is now proved before us" are left out, and no equivalent allegation is introduced. These words are of the very essence of the order, as without such proof the justices had no jurisdiction to make it. The order ought also to shew that the service took place "six days at least before" the hearing. It is only said that it was "within forty days" before. It is consistent with that allegation, that it may have been served only the day before the hearing. It is said, however, that the date of "the 8th day of November last" sufficiently shews that more than the time prescribed had intervened between the service of the summons and the hearing; but that date is laid under a videlicet, and although that might be sufficient in a pleading in a civil action, it is not so in an order like the present. *Reg. v. Duke of Grafton (a)*, shews that the Court will not make any intendment in favour of an instrument of this kind.

As to the other point, it is clear that by the 7 & 8 Vict. c. 101, s. 3, the jurisdiction of the justices to make the order only arises on proof that the summons was duly served on such person, or "left at his last place of abode." Here there was no proof of either. The place at which the summons was left was a house at which he had resided, but at which, at the time of the service, he had ceased to reside. The statute does not say the last "known" place of abode. [*Coleridge, J.*—What effect do you give to the word "last"?] It means the "present" abode, unless the party has no fixed abode, and then it refers to the last fixed abode which he had. Otherwise, if a man had resided in a house six years ago, and had left it for that period of time, and gone to reside elsewhere, the mother might serve it at the former place, and obtain a decision in her favour in his absence. [*Coleridge, J.*—The words of the section are, that the justices, "on proof"

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(a) 5 D. & L. 568.

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of the service, shall hear the complaint of the mother, and may adjudge, &c. Can you contend that if the proof were false, the justices would be acting without jurisdiction?] It is submitted, that upon its being shewn that the proof was false, the jurisdiction would fail. Unless the party is served, the justices have no authority under the third section to make an order. Where justices at the petty sessions made an order for the allowance of accounts of a surveyor of highways, which accounts had not previously been verified before one justice, pursuant to sect. 48 of the act, it was held that they acted entirely without jurisdiction; *Rex v. Justices of Somersetshire* (a). [He also contended that the service was bad, as a copy only of the summons, and not the original summons itself, had been served; but as no judgment was given upon this point, the argument is omitted.]

Cur. adv. vult.

COLERIDGE, J., delivered judgment.—In this case the main ground for the certiorari to remove an order of affiliation is defect in the service of the summons, the order having been made without the defendant's appearance. The order recites, "whereas the said Rice Jones having been duly served with the said summons within forty days from this day, to wit, on the 8th day of November last, and not appearing in pursuance thereof;" and it bears date 4th December. On reference to the 8 & 9 Vict. c. 10, schedule No. 8, note (d), it will be found that it varies considerably from the form and directions there given, and, among other things, in omitting the words "and six days at least before this day, as is now proved before us," which are there expressed, and which clearly are directed to be used for the important object of reminding the magistrates, that where they proceed in the absence of the party, clear proof of the service of the summons six days at least before the petty session, is of the essence of the jurisdiction.

(a) 5 B. & C. 816; S. C. 6 D. & R. 469.

But without deciding on this, a more material objection on the merits arises. The rule was moved for on an affidavit negating personal service of the summons, and stating that it was served at a house where the defendant formerly lodged, but had ceased to do so at the time of the service, and that it never reached him until after the day on which the order was made. The answer is only, that it was served at a house at which the deponent believed the defendant to reside, inasmuch as he was told so by the mistress of the house, who said that his clothes were still there, but that he had not been there the day previously. Considering that the defendant's affidavit might have been answered if untrue, I must take the fact to be as he states it. Now, by 7 & 8 Vict. c. 101, s. 3, jurisdiction attaches, under such circumstances as the present only, "on proof that the summons was left at the last place of abode." By the word "last," I understand the then present place of abode, if the party have any,—the last which he had, if he has ceased to have any. The service, therefore, I think, was not at the right place. But it was said that the jurisdiction attached on "proof" of the fact, and "proof" may be said to mean the result of evidence offered, on which the magistrates are to judge. But in a question of jurisdiction, although the magistrates are to form an opinion in the first instance on the evidence offered, which is to warrant their proceeding, yet justice requires, that if it can be clearly shewn that the fact fails, and that they never ought to have proceeded, the party interested may be at liberty to shew it. Suppose a proceeding against A., and evidence be given of personal service on him, the magistrates would properly proceed; but if it could be shewn that the witness had in truth served B., and that A. was ignorant of the whole proceeding, it would be impossible to say that an order or commitment against A. could be enforced. For these reasons I think the rule must be absolute.

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Rule absolute.

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KIRBY v. HICKSON.

[In the Common Pleas.

Coram *Wilde, C. J., and Talfourd, J.*]

An affidavit in support of a rule for entering a suggestion to deprive the plaintiff of costs under the 9 & 10 Vict. c. 95, stated that plaintiff dwelt and still dwells in K. Street, within twenty miles of defendant, who dwelt and still dwells in P. Street.

Held insufficient, for not shewing that the residences were within twenty miles of each other.

THIS was a rule to enter a suggestion to deprive the plaintiff of costs under the County Courts' Act.

The affidavit of the defendant, upon which the rule was obtained, stated "that the plaintiff, before and at the commencement of this action, dwelt and carried on his business, and still does dwell and carry on his business in Keppell Street, Russell Square, in the county of Middlesex, within twenty miles of the defendant, who, before and at the time of the commencement of this suit, dwelt and still does dwell at 65, Park Street, Grosvenor Square, in the county of Middlesex."

Paterson shewed cause. The affidavit is insufficient. It does not shew that the residence of the plaintiff is within twenty miles of the residence of the defendant, but only that it is twenty miles from the defendant. That allegation would be satisfied by evidence that the defendant happened to be within twenty miles of the plaintiff's residence when he was served with the writ of summons, although his residence may have been more than twenty miles from that of the plaintiff; and the statement which immediately follows, viz., that the defendant's residence is in Park Street, Grosvenor Square, does not supply the deficiency pointed out, for the Court cannot take judicial notice of the distance of Grosvenor Square from Russell Square. *Johnson v. Ward* (a) is similar to the present case. There an affidavit, which stated that "the plaintiff did not dwell more than twenty miles from the defendant,"

(a) 6 D. & L. 720.

“that is to say, that the defendant dwelt at No. 33, John Street,” &c., was held insufficient.

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Kay, in support of the rule. The language of *Wilde*, C. J., in *Peterson v. Davis* (*a*), is in favour of the sufficiency of the affidavit: “when we come to the clause which compels the plaintiff to have recourse to the local Court, s. 112, we find that it is compulsory only where the plaintiff dwells within twenty miles from the defendant,—which evidently means, from the defendant’s place of abode or dwelling, seeing that he is more likely to be known there than at a casual place of business.” [*Wilde*, C. J.—I was there dealing with the statute; and having read the words of it, which are, “where the plaintiff dwells within twenty miles from the defendant,” I said that that obviously meant “twenty miles from his residence.” But when parties come here with affidavits, they must not use words in an equivocal sense, but must express in unambiguous language what the statute means.] The case of *Johnson v. Ward* is distinguishable from the present, for there the affidavit merely stated that the defendant resided within twenty miles from the plaintiff, which was consistent with his residing more than twenty miles from the residence of the plaintiff. Here, however, the affidavit, after stating that the plaintiff resides within twenty miles of the defendant goes on to state the residences of each. [*Wilde*, C. J.—We may happen to know that Park Street is not twenty miles from Russell Square, but it is not so stated in the affidavit, and we cannot take judicial notice of that fact. Suppose the places happened to be utterly unknown to us, how could you call upon us to say that they were within a certain distance of each other. The Courts have refused to take judicial notice that Dublin is in Ireland (*b*), because there might be some other place of that name elsewhere.] In *Hayter v. Fish* (*c*) the affidavit was open to the objec-

(*a*) 6 C. B. 235, 252; S. C. 6 & A. 301; S. C. 1 Chit. 28.
D. & L. 79.

(*c*) 6 C. B. 568; 6 D. & L.

(*b*) See *Kearney v. King*, 2 B. 355.

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tion now made, and the objection appears to have been taken, but the Court overruled it and held the affidavit sufficient.

WILDE, C. J.—I own I cannot distinguish that case from the present one; but the point was expressly decided here two or three days ago, when the Court was full (*a*), and I think that there should be no unnecessary deviation from what ought strictly to be required in every case. If we deviate a little to-day, we shall be asked to go a little further to-morrow, and confusion and unnecessary expense to the suitors must be the result. The test in all these cases is whether the deponent could be indicted for perjury upon the affidavit. If the defendant were indicted for perjury upon this affidavit he would be acquitted, although he lived more than twenty miles from the plaintiff's residence. *Hayter v. Fish* (*b*) certainly appears inconsistent with the recent case I mentioned; I must therefore elect between the two, and I think I ought to adhere to the later decision.

TALFOURD, J.—The affidavit states two things, each of which is insufficient; and the question is, whether they are sufficient when taken together. It first states that the plaintiff resided within twenty miles of the defendant. That is clearly bad, because it would be satisfied by his residing within twenty miles of the place where the writ was served. And then it states the residences of each; but we cannot see that those are within twenty miles of each other. It does not state that which it is essential it should, viz., that the residences of the plaintiff and defendant are within twenty miles of each other.

Rule discharged (*c*).

(*a*) The reporters have been unable to ascertain to what case his Lordship here referred.

(*b*) 6 C. B. 568; S. C. 6 D.

& L. 355.

(*c*) *Cresswell, J.*, and *Williams, J.*, were at the Central Criminal Court.

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EDGAR v. HALLIDAY.

May 8.

[In the Common Pleas.

Coram *Wilde, C. J., and Talfourd, J.*]

JOYCE, on a former day in this Term, obtained a rule for judgment as in case of a nonsuit. The affidavit in support of the rule, and which was sworn on the 20th of April, stated that notice of trial was given for the adjourned sittings in Middlesex after Michaelmas Term; that the cause was entered and set down for trial accordingly; but that upon the trial coming on, the plaintiff withdrew the record, and “did not proceed to trial in pursuance of his said notice.”

The affidavit, sworn in Easter Term, in support of a rule for judgment as in case of nonsuit, stated that “notice of trial” was given for the sittings after Michaelmas Term, and that the plaintiff did not proceed to trial in pursuance of his said notice.

Prentice shewed cause. The affidavit is insufficient. It only states that “notice of trial” was given, and not “notice of trial in this cause,” and does not therefore shew any default in the plaintiff in not proceeding to trial after notice. Nor does the affidavit sufficiently shew a default by reason of the lapse of two Terms; for it does not state that the plaintiff has not proceeded to trial at all, but only that he has not proceeded to trial “pursuant to his notice,” which is not inconsistent with the fact of his having gone to trial since the sitting after Michaelmas Term. [*Wilde, C. J.*—I think the affidavit does sufficiently shew that notice of trial was given in this cause, and, consequently, that the plaintiff did make default, by not trying pursuant to such notice. But it is certainly consistent with this affidavit that the cause has actually been tried since the Michaelmas sittings.] The Court then called on

Held insufficient; as the cause might have been tried, although not in pursuance of the said notice, in the interval between the alleged default and the motion for the rule.

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Joyce, in support of the rule. The affidavit was sworn on the 20th of April, and shews with sufficient certainty that down to that time the plaintiff had not gone to trial. If the fact be otherwise, it is for the plaintiff to state it in answer to the *primâ facie* case made by the defendant's affidavit. The affidavit follows the forms given in the books of practice (*a*).

WILDE, C. J.—If this application had been made at a time when the interval between the default and the application would not have allowed the plaintiff to go to trial—(and the Court taking judicial notice of its practice, can see whether the interval would have allowed this or not)—the affidavit might have been sufficient. But when a party comes to the Court at a distant time, when the interval between the alleged default and the application for judgment as in case of a nonsuit, is so great that the plaintiff had ample opportunity of going to trial, I think that the defendant ought clearly to negative the plaintiff's having done so; and as his affidavit does not do so, I think it is insufficient, and that this rule must be discharged.

TALFOURD, J., (*b*) concurred.

Rule discharged.

(*a*) See *Chit. Forms*, p. 607, 6th ed. J., were at the Central Criminal Court.

(*b*) *Cresswell, J., and Williams,*



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LUSH v. RUSSELL.

February 13,
May 8.

[In the Exchequer of Pleas.

Coram Parke, B., Alderson, B., Rolfe, B., and Platt, B.]

ASSUMPSIT. The declaration, after stating that the defendant carried on the business of a baker at Bristol, and had hired the plaintiff as his servant for the period of four years, alleged as a breach, "that the defendant did not nor would,—although he the defendant hath never during the said part of the said term during which the plaintiff so remained and continued in his the defendant's service as aforesaid, ceased to carry on the said business of a baker, but during such last mentioned time carried on, and still does carry on the same in the said city of Bristol as aforesaid,—continue him the plaintiff in his the defendant's said employ, for the said term of four years, to be computed from the day and year first aforesaid, but, on the contrary thereof, during the said term of four years, and before the expiration thereof, to wit," &c., "refused to suffer the plaintiff to continue in his the defendant's said employ for the remainder of the said term of four years, and then wrongfully dismissed and discharged the plaintiff therefrom, *without any reasonable or probable cause whatsoever*, and hath thence hitherto wholly neglected and refused, and

In an action brought by a servant for dismissing him before the period for which he was hired had expired, the declaration alleged that the deponent wrongfully dismissed the plaintiff "without any reasonable or probable cause." The defendant pleaded, "that after the making of the promise and agreement, and before and at the time of the dismissal and discharge of the plaintiff by the defendant, he the said plaintiff conducted himself in an improper, offensive, dis-

obedient and insolent manner, and was guilty of habitual negligence and carelessness, insomuch that the defendant was forced and obliged to dismiss and discharge the plaintiff, and could not longer keep him in his the defendant's service; and the defendant was forced and obliged by such conduct of the plaintiff to put an end to such service and employ: without this, that the defendant wrongfully dismissed and discharged the plaintiff therefrom, without any reasonable or probable cause whatever, in manner and form as the plaintiff hath above in that behalf alleged." Conclusion to the country.

At the trial, the Judge refused to receive evidence of plaintiff's misconduct, deciding that the plea put in issue the dismissal only.

Held a misdirection, since although the allegation in the declaration was immaterial and surplusage, and the plea which put it in issue bad on demurrer, still the issue being raised, it ought to have been disposed of by the jury. *Held* also, that the defendant having the affirmative of the issue to prove, the onus probandi would be on him.

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still doth neglect and refuse to continue the plaintiff in his the defendant's said employ for the remainder of the said term, or any part thereof."

Plea. "That after the making of the promise and agreement, and before and at the time of the dismissal and discharge of the plaintiff by the defendant, to wit," &c., "he the said plaintiff conducted himself in an improper, offensive, disobedient, and insolent manner, and was guilty of habitual negligence and carelessness in and about his said capacity and duty of a journeyman baker, insomuch that the defendant was forced and obliged to dismiss and discharge the plaintiff, and could not longer keep him in his the defendant's service; and the defendant was forced and obliged by such conduct of the plaintiff, to put an end to such service and employ. Without this, that the defendant then wrongfully dismissed and discharged the plaintiff therefrom, without any reasonable or probable cause whatsoever, in manner and form as the plaintiff hath above in that behalf alleged." Conclusion to the country. Whereupon issue was joined.

The cause came on for trial before *Cresswell*, J., at the last Summer Assizes held at Bristol, when the defendant, admitting the dismissal, proposed to adduce evidence to shew that the plaintiff had so misconducted himself as to justify the dismissal. The learned Judge refused to receive this evidence, on the ground that the plea put in issue the dismissal only. A rule for a new trial having been obtained on the ground of misdirection,

Butt and *M. Smith* shewed cause, and cited *Frankum v. The Earl of Falmouth* (a); *Powell v. Bradbury* (b); *Palmer v. Gooden* (c); *Bac. Abr.* tit. "Pleas and Pleading," (K 2); *Co. Litt.* 281 b.

(a) 2 A. & E. 452.

Journ., C. P. 116.

(b) 7 C. B. 201; S. C. 18 Law

(c) 8 M. & W. 890.

Cockburn and Peacock, in support of the rule, cited *Stephen on Pleading*, p. 275—8, 5th ed.; *Amor v. Fearon* (a); *The Bishop of Meath v. Marquis of Winchester* (b); *Sir Ralph Bovy's case* (c); *Goram v. Sweeting* (d).

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The arguments sufficiently appear from the judgment.

Cur. adv. vult.

PARKE, B., delivered the judgment of the Court.—This was an action brought by the plaintiff, a servant, for dismissing him during the period for which he was hired, viz., four years; and the plaintiff in his declaration alleged that the defendant refused to permit the plaintiff to continue in his service during the term, and wrongfully dismissed him therefrom, without any reasonable cause.

The defendant pleaded, that after the making of the agreement, and before the discharge and dismissal, the plaintiff conducted himself in an improper and disobedient manner, and disobeyed the defendant's lawful orders; without this, that the defendant wrongfully dismissed and discharged the plaintiff without reasonable cause, and concluded to the country.

On the trial, the defendant having admitted the dismissal, proposed to shew that the plaintiff had misconducted himself, so as to justify the discharge; but the learned Judge refused to receive the evidence, and directed a verdict for the plaintiff, being of opinion that the plea put in issue the dismissal only. We are to decide whether that direction was right, and we are of opinion that it was not. The question is not whether the plea would have been bad on demurrer for putting in issue an immaterial allegation, but how the issue raised was to be disposed of at the trial.

(a) 9 A. & E. 548; S. C. 1 P. 3 Scott, 561; 4 Cl. & Fin. 445.
& D. 398. (c) Ventr. 211, 217.

(b) 3 Bing. N. C. 183; S. C. (d) 2 Saund. 205.

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There is no doubt that the plaintiff might have omitted the allegation that the defendant dismissed him "without reasonable cause," and that the averment of his having done so was, in the declaration, immaterial and surplusage, and ought not to have been put in issue; and that the plea, in form at least, throws the burthen of the proof of the want of reasonable cause on the plaintiff, which the defendant, on proper pleadings, ought to have borne. On these grounds the plea is clearly demurrable; but, not having been demurred to, the matters which it *does put in issue*, though immaterial in that stage, and improperly put in issue, must be disposed of by the jury, under the direction of the Judge. For example, if the plea were to put in issue matter of aggravation unnecessarily stated, and only that,—as the conversion of goods in an action of trespass for taking them, the death of cattle in the same form of action, for driving them,—though the plea would be unquestionably bad, the verdict must be taken one way or the other, upon the issue at the trial. In like manner it must be taken, if the plea put in issue that *and another* immaterial fact; the only question being *whether it is put in issue*. Now, it is certain, that if the form of the traverse is such that the material may be separated from the immaterial averments, the material only need be proved on the trial. Such is the case where there is a plea which is a general denial only, as not guilty in trespass or case, where immaterial matter or matter in aggravation is stated; such would be the case on non assumpsit under the old system on such a declaration as the present; and such would have been the case if the defendant had traversed the allegation of dismissal in the general form, "that he did not dismiss the plaintiff modo et formâ;" then the dismissal, the only material part, would have been in issue.

Littleton, in sect. 483, says as follows: "these words (modo et formâ prout, &c.), in many cases are words of form of pleading, and not words of substance. For if a

man bring a writ of entry in casu proviso of the alienation made by the tenant in dower to his disinheritance, and counteth of the alienation made in fee, and the tenant saith, that he did not alien in manner as the demandant hath declared, and upon this they are at issue, and it is found by verdict that the tenant aliened in tail, or for term of another man's life, the demandant shall recover: yet the alienation was not in manner as the demandant hath declared, &c." An explanation is given in *F. N. B.* 206, (G). "The writ in casu proviso" "supposeth the alienation to be made in fee, although it be but for life, or in tail, for that there is no other form:" and it "is not material; for if it be in fee, or in tail, or for life, it is a forfeiture of the estate." Again, in the case of *Pope v. Skinner* (a), where in replevin the defendant avowed for damage feasant in the month of April, and the plaintiff pleaded in bar that one Williams was seised in fee, and had a right of common, and demised the land to him for a year from Lady Day before, and on a traverse "non demisit modo et formâ" the lease appeared to begin on Lady Day, it was held that the substance of the issue was, whether the lease covered the time of the trespass, which it would do, whether it commenced on the 25th or 26th of March, and the modo et formâ was immaterial. From the report, however, it seems that the verdict was special, stating the facts; and it is said that the jury might have found against the plaintiff, and could not safely have found a general verdict for him.

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A distinction is taken in *Co. Litt.* 281 *b*, in the commentary to the above section, between the effect of the words "modo et formâ," where the issue is on the point of the writ or action, and where it is on a collateral point; in the former case, it is said, they are matter of form, in the latter, material. That the issue was on the point of the writ or action in the case put by *Littleton*, is abundantly clear. Whether it is so in this case, or within the meaning of that rule, it is unnecessary to decide; for assuming the words "modo et

(a) Hob. 72.

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forma" to be quite immaterial, it will make no difference in this case. Again, if there be a plea of justification which contains material and immaterial matter, the replication de injuriâ absque tali causa would put in issue the material matter only; *Spilsbury v. Micklethwaite* (a); *Davis v. Chapman* (b). But if the traverse, instead of being in general form, puts in issue the immaterial part *in express terms*, that must be disposed of by the jury, and, generally speaking, according to the terms of the issue. The objection to such a plea on demurrer is, that if issue were taken on it, the plaintiff would be obliged to prove what but for the form of the issue he need not have proved. This is the general character of the objection that a traverse is too large; as in the case of *Goram v. Sweeting* (c), where it is very correctly said in the note of the learned editor, "it shall not be permitted to a defendant, by expressly traversing any allegation in the declaration by a formal traverse, to compel the plaintiff to prove more than he would be bound to do, if the defendant had pleaded the general issue only to the declaration."

Now, there cannot be any doubt that this form of a traverse does, in express terms, deny the want of reasonable cause, and, therefore, that question must be disposed of by the jury. Whether it throws the burthen of proof on the wrong party is immaterial in the present inquiry; if it does, it is an additional reason for demurring to it, but it nevertheless puts in issue the want of reasonable cause, however informally. We think, however, that on the trial of the issue, the onus probandi would be on the defendant, on the ground that he had the affirmative of the proposition to maintain, and that the defendant ought to justify the act of dismissal, which is *primâ facie* a breach of the contract between the parties.

Upon reference to the authorities and cases cited in the

(a) 1 Taunt. 146.

(c) 2 Wms. Saund. 207 a, n. 24,

(b) 2 M. & G. 921; S. C. 3 6th ed.

Scott N. R. 238.

argument, there is none that is at variance with the rule,—that if the traverse be general in its terms, it does not involve matter which need not have been pleaded; and that if it be special, denying that matter expressly, it does,—except the case of *Powell v. Bradbury* (a), on the authority of which, no doubt, the learned Judge proceeded.

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In the present case there is an inducement which leaves no doubt as to the intention of the pleader in the traverse, which there was not in that; but we do not think we ought to rely on that distinction.

We cannot ascertain from the short report of the case of *Powell v. Bradbury* in the *Law Journal*, whether the question of what was in issue on such a traverse, on which the opinion of the Court appears to have been declared, was material to the decision of the case, or extrajudicial; in the report of the same case in 7 *Com. Bench Rep.*, just published, it does appear to have been extrajudicial. Be this as it may, it does distinctly appear that the opinion was founded on the authority of the case of *Frankum v. The Earl of Falmouth* (b), which we think inapplicable, as the question there arose on the issue on a plea of not guilty, and it was rightly held, that although there was an averment in the declaration that the defendant wrongfully diverted a watercourse, the wrongful nature of the act was not in issue. It was not the case of an express traverse. Matter of aggravation could not have been in issue on not guilty, and yet if expressly put in issue, it must have been proved. So, unnecessary matter, as an averment of the defendant being of full age when he executed a bond, if the plea had stated (admitting the execution of the bond) that he was not then of full age, that question could have been in issue; and equally so, if the issue was such, (whether informal or not in that respect is of no consequence), as to put both facts, the execution of the bond and the majority, in issue.

(a) 7 C. B. 201; S. C. 18 Law Journ., C. P. 116.

(b) 2 A. & E. 452.

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The case of *Palmer v. Gooden* (a), which was the other case cited for the plaintiff, does not decide the question as to what should be proved on an issue involving immaterial matter of the description which this does. A satisfactory reason for that judgment is, that a traverse is not bad which involves what is not merely immaterial, but impossible, and therefore incapable of being proved at all; as a traverse of an entry on, and an expulsion from, an incorporeal hereditament, viz., tolls. *Tindal*, C. J., says, indeed, that an issue upon the substantial matter to be tried by the jury is not bad, merely because it includes in it something of total surplusage and immateriality. But that is not the case here; for the allegation of the want of reasonable cause need not have been made by the plaintiff, and is surplusage in that sense; yet being expressly, though informally, put in issue, it is not totally immaterial, but the contrary.

There are, however, other cases not cited on the argument, to which it is necessary to advert, which are authorities that where an immaterial circumstance is traversed expressly, it need not be proved.

One is the case of *Carvick v. Blagrove* (b), an action by the assignees of a leasehold reversion. The declaration stated that the lessor, at the time of the lease, was lawfully possessed of certain premises, that is to say, for the remainder of a term of twenty-two years, commencing the 25th of December, 1797, and made the lease; and then the plaintiff derived title by assignment from the lessor, and alleged breaches. The defendant pleaded that the lessor was not, at the time of the lease, possessed for the residue and remainder of the said supposed term of twenty-two years, modo et formâ, &c.; and there was a general demurrer. The Court held, and very properly, that the allegation was traversable, and did not amount to “nil habuit in tenementis;” and gave two answers to the second objection, that the plea put in issue the precise term of the

(a) 8 M. & W. 890.

(b) 1 B. & B. 531.

lease, and that the plaintiff's case would be defeated, if it appeared that the term was not of the precise extent alleged. The first of these answers was, that if such was the consequence of the too great particularity of the allegation, it was the plaintiff's own fault. The second was, that such consequence would not follow, because the plea put in issue the substance of the allegation only, and the substance was, that the lessor was possessed of a term, and made a derivative one; and the two authorities of *Litt.* sect. 483, and *Pope v. Skinner* (a), above cited, were referred to as proving that on the traverse of an allegation, the words "modo et formâ" are in many cases not words of substance.

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The first of these two reasons is satisfactory, and falls within the authority of a class of cases which decide that if a party allege a precise estate, or make a precise allegation, which he is not bound to do, yet if it be material and bear on the question, he gives the other side the advantage of traversing it; see 2 *Wms. Saund.* 207 b, 6th ed.; *Dyer*, 365 a, pl. 32; *Tatem v. Perient* (b); and *Smith v. Dixon* (c). The plaintiff need not have stated the precise term, if he had alleged it to be such as to warrant the underlease,—as, if he had stated that he was possessed of the tenement for a certain term of years, whereof more than the number of years in the underlease were then to come and unexpired; but having stated the precise term, and in no other way shewn that it warranted that underlease and created a chattel reversion, he enabled the defendant to traverse the precise term.

But the second reason given by the Lord Chief Justice *Dallas* is not satisfactory, for both the authorities cited (*Litt.* s. 483, and *Pope v. Skinner*), are cases where the traverse is in the general form, "non alienavit modo et formâ," "non demisit modo et formâ," which only puts in issue the material part, as has been above stated; whereas

(a) Hob. 72.

(b) Yelv. 195.

(c) 7 A. & E. 1; S. C. 2 N. & P. 46; 6 Dowl. 47.

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the traverse in that case was expressly of the precise term of twenty-two years.

Another case is that of *Barber v. Lemon* (a). There, the plea having stated that the bill of exchange declared upon had been indorsed over by the plaintiff, before the commencement of the suit, to a third person, who then became and *thence afterwards*, to wit, *thence hitherto*, remained the holder; and the replication having stated, that at the time of the commencement of the suit the plaintiff was the holder, without this, that the third person from the time of the indorsement hitherto remained the holder thereof “modo et formâ;” the replication was held not to be bad on special demurrer, as being too large and putting in issue immaterial matter, viz., the title to the bill after the commencement of the suit and up to the time of the plea pleaded.

The difficulty there arose from the introduction of the term “hitherto” into the traverse, without which there would have been no question; but the Court held, that the traverse put in issue the title of the third person at the time of the commencement of the suit, as it certainly did; and that was the only material part, as the plaintiff could not recover if that was proved, and the finding on the averment as to the time subsequent was quite immaterial, and that averment was total surplusage and immateriality, within the meaning of the rule laid down by *Tindal*, C. J., in *Palmer v. Gooden* (b). But in the present case the question whether there was reasonable cause of dismissal was a material matter, though alleged out of its proper place, and though the issue was improper.

Rule absolute.

(a) 11 Q. B. 302.

(b) 8 M. & W. 890.



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PARRY v. DAVIES and WIFE.

May 8.

[In the Exchequer of Pleas.

Coram *Rolfe, B., sitting alone*].

A RULE had been obtained for leave to enter a suggestion to deprive the plaintiff of costs, under the County Courts' Act (9 & 10 Vict. c. 95).

The affidavit upon which the application was granted was made by the husband, and stated that the action had been brought to recover from the defendants a sum under 20*l.*, being money paid by the plaintiff for Mrs. Davies, the wife, before marriage; that the cause of action arose within the jurisdiction—and further, that at the time of the action being brought Davies, the husband, resided within the jurisdiction of the County Court.

Where an action had been brought in a superior Court against husband and wife to recover a sum under 20*l.*, for money paid for the wife before marriage, on an application to deprive the plaintiff of costs under the County Courts' Act, an affidavit, stating only that the husband resided within the jurisdiction of the County Court at the time of the action being brought, was held insufficient.

Edwards now shewed cause. There is a defect in the affidavit. The action being against husband and wife for money paid for the wife before marriage, both must have lived within the jurisdiction of the County Court in order to compel the plaintiff to sue there; whereas the affidavit only states that the husband resided within the jurisdiction. It is consistent with this that the wife was living elsewhere, out of the jurisdiction.

Grove, in support of the rule. The process is issued against the husband, and the Court will not presume that the wife dwells apart from her husband. [*Rolfe, B.*—The affidavit ought to shew that the parties are within the jurisdiction. The Court should not presume anything.] By sect. 60, the summons “may issue in any district in which the defendant *or one of the defendants* shall dwell or carry

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on his business at the time of the action brought." Here, one of the defendants, the husband, is shewn to have dwelt within the jurisdiction. But the plaintiff is entitled to sue so as to obtain judgment against both; in the County Court, he could obtain judgment against one only. [*Rolfe*, B.—I think that is so.] The affidavit makes out a *prima facie* case which has been held to be sufficient; *Butler v. Corney* (a); *Hayter v. Fish* (b).

ROLFE, B.—The rule must be discharged. The cases cited only decide, that where an affidavit states a *prima facie* case, that is, facts which, if true, would deprive the plaintiff of costs, the Court will not on affidavit inquire further; but that is not done here, and I am not to presume anything. The action is against husband and wife, for money paid for the wife before marriage, and the plaintiff is entitled to judgment against both; but the affidavit only shews that one defendant resided within the jurisdiction of the County Court. It is true that, looking at the relationship of the parties, probably they both did reside within the jurisdiction, but we ought not to conjecture facts which the defendant might have sworn to. The rule must, therefore, be discharged, but without prejudice to a second application.

Rule discharged.

(a) 2 Exch. 474; S. C. 6 D. & L. 355. But see *Kirby v. Hickson*, L. 45. *ante*, p. 364.

(b) 6 C. B. 568; S. C. 6 D. &



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WILLIAMS and Others v. ROBERTS.

May 8.

[In the Exchequer of Pleas.

Coram *Rolfe, B., sitting alone.*]

AUDITÂ QUERELÂ.

Badeley moved for a rule to shew cause why service of the writ of venire facias in this action, and summons to appear, at the last known place of abode of the defendant, and by serving the same on his attorney, should not be deemed good service.

Affidavits which had been made by the plaintiffs' attorney and others stated, that a writ of auditâ querelâ had been issued and allowed, and that a writ of venire facias, returnable on the 4th of May, 1850, had been issued, and lodged with the undersheriff of Gloucestershire; but that the defendant could not be found at his last place of abode or elsewhere, although diligent search had been made for him, and every effort made to serve him with the writ and summons to appear. They also stated facts which shewed that he was keeping out of the way to avoid service of process.

In auditâ querelâ, the defendant being absent and keeping out of the way to avoid service, the Court refused to grant a rule to shew cause why service of the writ of venire facias and summons to appear, at the last known place of abode of the defendant, should not be good service.

Badeley. There is some difficulty in ascertaining what course the plaintiff should pursue, inasmuch as the books are silent on the subject. [*Rolfe, B.*—Is not the proper course to proceed to outlawry?] No provision is made for this form of action under the new process. Applications similar to the present are granted in actions of ejectment. [*Rolfe, B.*—That action is peculiar, being a fiction and the creature of the Court.] It is mentioned in *Blackstone* (a), that in real actions warning on the land is given by erecting a white stick or wand on the defendant's grounds. In a late case

(a) *Blackst. Com.* vol. 3, p. 279.

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in this Court (*a*), it was thought that an *auditâ querelâ* is rather in the nature of a suit in equity than an action. In *Fitzherbert's Natura Brevium*, 102 H., the form of the writ is given; and at p. 104 V. it is said, "and the process in *auditâ querelâ* is *venire facias* and *distringas*, alias and *pluries distringas*, and if he return *nihil* or *non est inventus*, he shall have a *capias* against the defendant." [He also referred to the note to *Turner v. Davies*, 2 *Wms. Saund.* 147, n. (1), and *Com. Dig.* tit. "*Auditâ Querelâ*."] [Rolfe, B. —Except in cases of statutory exceptions, I do not know of any case of service except personal being sufficient. Do you find anywhere the form of the writ of *venire facias*? *J. Brown*, *amicus curiæ*. A form is given in *Coke's Entries*, tit. "*Auditâ Querelâ*" (*b*).]

ROLFE, B. (after consulting with the other Judges.)—All the other Judges feel, even more strongly than I do, that you cannot have a substitute for personal service of this process.

Rule refused.

(*a*) *Giles v. Hutt*, 1 Exch. 701;
S. C. 5 D. & L. 387.

(*b*) Page 84.

Ex parte THOMAS JAMES.
[Reported *ante*, p. 4.]

CATERER v. DEAN.
[Reported *ante*, p. 38.]

MILLS v. BEST.
[Reported *ante*, p. 43.]

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COBBETT v. SIR G. GREY and Another (*a*).

January 11, 26.

[In the Exchequer of Pleas.

*Coram Pollock, C. B., Parke, B., Alderson, B., and
Platt, B.]*

IN this case the plaintiff had brought an action of trespass for assault and false imprisonment against one of the principal Secretaries of State and the Keeper of the Queen's Prison, for removing him from one division of the Queen's Bench Prison in which he was confined, to another in which he alleged that by law he ought not to be placed. The defendants pleaded not guilty by statute, and two special pleas of justification. At the trial, the Judge directed the jury to find a verdict for the defendants on all the issues. On subsequent motion, however, this Court directed the verdict on the first issue to be entered for the plaintiff. Judgment was accordingly signed for the plaintiff on the first issue, and for the defendants on the other two; and the plaintiff proceeded to tax the costs. While the taxation was proceeding, the defendants applied to the Lord Chief Baron, before whom the cause was tried, to certify, under the 4 Ann. c. 16, s. 5, that they had "a probable cause to plead" the general issue; which certificate his Lordship accordingly granted. No notice was given of the intended application for the certificate; but the plaintiff was informed that the defendants disputed his right to any costs, and that they objected to the taxation. Upon the certificate being granted, the Master refused to proceed with the taxation; whereupon,

A Judge may grant a certificate under the 4 Ann. c. 16, s. 5, upon an ex parte application.

It is no objection to such a certificate that it was granted after the taxation had commenced, the plaintiff having notice that his right to tax the costs was disputed.

(*a*) This case was decided in Hilary Term last, but was accidentally omitted in its proper place.

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The plaintiff, in person, now moved for a rule calling upon the defendants to shew cause why the certificate should not be set aside. He submitted that the Judge had no power to grant a certificate after the judgment had been signed and the taxation was commenced; and that even if he had, he ought to have first heard both parties. [The case of *Robinson v. Messenger* (a) was referred to by the Court.]

Cur. adv. vult.

PARKE, B., delivered the judgment of the Court.—The objection of Mr. Cobbett was, first, that the Judge had no power to grant the certificate at all after the lapse of time; and, secondly, that it ought not to have been granted, except on hearing the parties. There is an express authority which was mentioned in the course of the argument (a), where the same matter had been brought before my Brother *Patteson*, who had granted a similar certificate under the same circumstances, upon an *ex parte* application after the trial. The only difference between that case and the present was, that on the latter occasion it appeared that the taxation had actually begun. In the other instance the application was made to my Brother *Patteson* before the taxation had actually commenced. It appeared, however, that it had been distinctly notified to Mr. Cobbett that an objection would be taken, and that he had no right to have his costs taxed. That was quite sufficient to put him on his guard to see whether he was correct or not in his proceedings. There is, therefore, no ground for preventing the certificate from operating on that account; nor is there any reason why the Court should interfere to make any alteration with reference to the costs. We are all of opinion that such an application may be heard *ex parte*, and

(a) 8 A. & E. 606; S. C. 3 N. & P. 583.

that it is quite competent to the Judge to grant such a certificate. The certificate could not in itself be rescinded by the Court; but, undoubtedly, if the Judge had not authority to make it, the Court would not have allowed it to operate in the taxation of costs. We are all clearly of opinion, under the circumstances,—even apart from the authority of that case, but certainly with the authority of that case,—that the certificate was properly made; and, therefore, there will be no rule.

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Rule refused.

TRINITY TERM,

IN THE THIRTEENTH YEAR OF THE REIGN OF VICTORIA.

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REGINA v. CARTTAR.

[*Bail Court. Coram Coleridge, J.*]

The Court set aside an attachment against an attorney for not paying over certain moneys received in his professional character, where the party obtaining it, had described herself in her affidavit, as a *widow* of the name of *A. C.*, whereas she was at that time a *married woman* of the name of *A. H.*; although it did not appear that the false name and description were used for any fraudulent purpose.

THIS was a rule to set aside an attachment (*a*).

The attachment had been issued against the defendant for disobedience to a rule of Court, ordering him to pay over certain sums of money, which he had received in his professional character, to one Amelia Cribb. The demand had been made under a warrant of attorney executed by Amelia Cribb. The rest of the facts sufficiently appear in the judgment of the Court.

Ogle shewed cause (*b*).

Badeley, in support of the rule.

Cur. adv. vult.

COLERIDGE, J., now delivered judgment.—This was a rule for setting aside an attachment and all subsequent

(*a*) This case is reported on another point, *ante*, p. 274.

(*b*) In last Easter Term.

proceedings, on the ground that the party applying for it had described herself as a widow of the name of Amelia Cribb in one of the affidavits upon which the attachment was obtained; whereas in truth she was a married woman, and of the name of Hearn. This is admitted on the other side, and the explanation offered is, that when the employment of the defendant as attorney took place, out of which the proceedings originated, she was a widow, and named Cribb, but that she had subsequently married, and for private reasons was desirous of concealing her marriage from her own family; she had, therefore, used her former name and described herself still as a widow, residing in the house of one Hearn. There is no ground for supposing that the false name and description were used for any fraudulent purpose as between herself and the defendant; but I think the attachment cannot be sustained. The demand has been made in a character which the prosecutrix no longer bore, and she had no longer the capacity to give a legal discharge for the money demanded, if the defendant had been willing to pay it. Moreover, she had made and used an affidavit into which for her own purposes, and wilfully, she had introduced a falsehood, and thereby deceived the Court; and when this is disclosed, the Court cannot sustain any proceeding founded on it. The rule will, therefore, be absolute.

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Rule absolute.

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JOSEPH v. HENRY.

[*Bail Court. Coram Coleridge, J.*]

If, on the face of a plaint in the County Court, the subject-matter stated is clearly within its jurisdiction; this Court will not interfere to review the decision of the Judge, where the fact on which his jurisdiction depends, rests upon conflicting evidence.

THIS was a rule for a prohibition to the Judge of the Southwark County Court of Surrey, to prohibit him from further proceeding in a certain plaint in that Court between the above parties.

Lush shewed cause.

T. Jones, in support of the rule.

The case of *Thompson v. Ingham and Another (a)* was referred to.

The facts and arguments sufficiently appear in the judgment of the Court.

Cur. adv. vult.

COLERIDGE, J.—This was a rule for a prohibition to the Southwark County Court, under circumstances which, as well as I can collect them from conflicting affidavits, and as far as they are material to the present question, appear to be as follows.

One Van Millingen, the father-in-law of the plaintiff, sold upon two occasions jewellery and watches to the defendant; after the sales of which, as the defendant alleges—one being for cash paid, and the other on six months' credit, without any security,—the defendant, who is a travelling jeweller, left home. During his absence, as he alleges,—which, however, is denied,—Van Millingen called at his house and procured from Eve Henry, the defendant's wife, three acceptances in his name, for 11*l*,

(a) *Ante*, p. 216.

12*l*., and 11*l*., payable respectively at two months, ten weeks, and three months, from the 22nd of December, 1847. On the defendant's side it is sworn, that these acceptances were given without authority, which is denied on the plaintiff's. These bills became due, as the defendant alleges, during his absence from home; and on his side, it is sworn that, being unpaid, Van Millingen coming to his house, by threats extorted from his wife a delivery of a gold watch and three diamond studs; and he certainly gave her a receipt, dated 22nd of March, 1848, in these terms: "Received of Mrs. Henry a gold lever watch and three diamond studs, until Mr. Henry comes to town, as part security for three bills. J. Van Millingen." The plaintiff states that he discounted these three bills for Van Millingen; but upon one of them, the two months' bill, Van Millingen sued the defendant in the Palace Court in September, 1849, which cause was removed into this Court, and is now pending.

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In April, 1848, the defendant, by his attorney, demanded of Van Millingen the re-delivery of the watch and studs, as having been handed over by Mrs. Henry without authority from her husband; but at this time nothing was said to repudiate the acceptances, nor was any thing done to enforce the re-delivery.

In September, 1849, the plaintiff gives defendant notice that the watch and studs have been handed to him by Van Millingen on his (the defendant's) account, as a collateral security for the payment of *two* returned acceptances for 12*l* and 11*l*., and threatens to send them to Messrs. Debenham for sale; and on the 5th of February, 1850, the plaintiff gives a second similar notice, speaking of the watch and studs as "having been left with me as security for the payment of the two bills," and threatening to proceed for the recovery of any balance that may remain due on the bills, as he may be advised.

In pursuance of this, the plaintiff brings the plaint now in question to recover 4*l*. 19*s*., "in an action on contract

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for the balance of two bills of exchange due from the defendant to the plaintiff.”

Upon the trial, the sale by the plaintiff of the watch and studs for 18*l.* 1*s.* was proved, and the plaintiff obtained judgment for the above balance, although the defendant’s attorney proved the facts stated above, and protested against the jurisdiction of the Court; “the Judge,” as it is sworn by the defendant’s attorney, “stating that, in spite of the evidence adduced, he should and did treat the giving such studs and watch as in payment of the said bills.”

It is difficult upon this statement to understand how the Judge could arrive at this conclusion. Supposing that Mrs. Henry had authority and did in fact voluntarily deliver the watch and two studs to Van Millingen, yet his receipt proves incontestably that they were merely delivered as part security for the bills, and that would confer no power of sale, or right to treat the proceeds of a sale as payment, even on him,—still less would it enable him to hand over the pledge to his indorsee, or to transfer such powers to him. The Judge, however, has arrived at a conclusion of fact, if we understand him as stating that he considered the defendant to have conferred the power of sale or appropriation of the proceeds on the plaintiff, which would certainly give him jurisdiction; and if he has supposed that the power was conferred by the defendant on Van Millingen, and was by law transferable from Van Millingen to the plaintiff,—in that case, also, he has made a way, however incorrectly in point of law, to jurisdiction in the cause. The question therefore might be, whether, if this Court see that the Judge has drawn a wrong conclusion in point of fact or of law, in order to found his jurisdiction, it can review such conclusion and prohibit the Judge from proceeding. But this question, even supposing the affidavits were free from conflict with each other, would arise here with this attendant circumstance,—that the decision on the merits turns on the identical point on which the question of jurisdiction arises; and that on the face of the

plaint a subject-matter is stated clearly within the jurisdiction. The plaintiff claims a sum under 20*l.*, the balance remaining due on the bills of exchange, together amounting to 23*l.* He cannot recover unless he proves the sum due as a balance remaining due on those bills; and if he proves that, the Judge has jurisdiction. Now this Court cannot review his decision on the merits. Moreover, even after the objection made to the jurisdiction, as that did not arise upon the face of the proceedings, but was founded on facts contested and to be proved, the Judge had clearly power to inquire into those facts. If, upon the inquiry, he had found that the money claimed was not a balance remaining due, for that no part of the 23*l.* could be considered as paid, it would have been his duty to abstain from proceeding further; and the Court has no right to presume that he would not. *Thompson v. Ingham and Another* (a) only decides that where upon the record, stating the facts, it is admitted that the Judge has decided wrongly on the fact on which his jurisdiction depends, so that the Court sees undoubtably that he had not jurisdiction, prohibition will lie. But in this case we have conflicting affidavits; it is possible that, in spite of the defendant's evidence, the Judge's decision may have been right on the fact; and if I were to make this rule absolute, I should establish a precedent for reviewing the decision of the Judge in every case where his jurisdiction depended on conflicting evidence; which would be full of inconvenience and contrary to all principle. I think, therefore, this rule should be discharged.

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Rule discharged.

(a) *Ante*, p. 216.



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GRAVATT v. ATTWOOD.

[Bail Court. Coram Coleridge, J.]

A verdict was taken for the plaintiff for the damages named in the declaration, subject to a reference.

At the first meeting before the arbitrator, the defendant objected that the order of reference was not drawn up according to the terms agreed upon; inasmuch as it did not authorize the arbitrator to direct a verdict to be entered for him on an issue of payment, but only to reduce the damages; and he applied to have the hearing postponed till an application could be made to the Judge to amend the order. The plaintiff contended that the arbitrator had full authority to direct a verdict for the defendant upon

A RULE had been obtained in last Hilary Term, (on the 30th of January), calling upon the defendant to shew cause why the postea, judgment, and all subsequent proceedings in this cause, should not be set aside.

The following facts appeared upon the affidavits in support of the rule. The action was in indebitatus assumpsit for work and materials, and goods sold and delivered, &c. The defendant pleaded, first, non assumpsit, and, secondly, payment by persons whose names were to the defendant unknown, to wit, the Committee of the Wexford, Waterford, and Valencia Railway Company, and acceptance by the plaintiff in full satisfaction of the causes of action. The plaintiff joined issue upon the first plea, and traversed the second, upon which traverse issue was joined. The cause was tried at the Surrey Summer Assizes, 1849, when a verdict was taken for the plaintiff for the damages claimed in the declaration, subject to a reference. The order of reference was dated the 6th of August, 1849, and was in the following form: "It is ordered," "with the consent of," &c., "the defendant, by his counsel, admitting his liability to the plaintiff in respect of the several matters alleged in the declaration (a), that a verdict be entered for

(a) The defendant was a member of the provisional committee of the company, and his counsel stated in the course of the argument, that all that was intended

by these words was, that the defendant admitted his liability as a member of the provisional committee for debts incurred by them.

that issue as it stood, and the arbitrator himself was of that opinion. The arbitration was accordingly proceeded with upon that view, and an award was made directing a verdict to be entered for the defendant on the issue of payment: *Held*, on motion to set aside the postea and judgment, that it was not competent for the plaintiff to object to the above misconstruction (if any) of the order of reference.

the plaintiff, damages twenty thousand pounds, costs forty shillings; but that such verdict shall be subject to the award, order, arbitrament, final end and determination of" A. R., Esq., &c., "who is hereby empowered to direct to what amount the said damages shall be reduced, and to whom this cause is referred, to order and determine what he shall think fit to be done by either of the parties aforesaid respecting the matters in dispute." The costs of the cause were to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. On the 20th of December, 1849, the arbitrator made his award, by which, after reciting the order of reference, he directed, "that the verdict found for the said plaintiff as aforesaid shall be set aside; that a verdict shall be entered for the said defendant upon the second and only other issue joined in the said cause, and that the plaintiff shall pay to the said defendant the costs of the said reference, and of this my award, to be taxed," &c.

The affidavit in opposition to the rule was made by the attorney for the defendant, and set out a copy of the note taken by the Judge at the trial, of the terms on which the cause had been referred, which were as follows: "Liability admitted; by consent, verdict for plaintiff, damages in declaration, subject to a reference to Mr. R. on the usual terms." It also stated, that the defendant had attended before the arbitrator by counsel, and that before proceeding with the reference his counsel "called the attention of the arbitrator to the terms of the order of reference, and objected to proceed thereunder until the same was altered, so as to enable the arbitrator to award specifically upon each issue raised, since, as he suggested, upon the terms of the order as it stood, it might thereafter be contended that the arbitrator had only power to direct to what amount the damages in the said action should be reduced. That thereupon the counsel for the plaintiff contended, that the terms were sufficiently clear and comprehensive to enable the arbitrator to dispose of the issues raised in the cause.

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That the arbitrator expressed himself of opinion that the view taken by the plaintiff's counsel was the correct one, and that, inasmuch as he was empowered to order and determine what he should think fit to be done by either of the said parties to the cause respecting the matters in dispute, he could, on its being proved that the amount paid to the plaintiff was sufficient, direct a verdict to be entered for defendant on that issue; although in that case he would direct a nominal verdict to be entered for the plaintiff upon the first and only other issue; inasmuch as the defendant, by the terms of the order of reference admitted his liability to plaintiff. And that the arbitration was proceeded with to the end upon that footing."

Edwin James, Willes, and Hawkins, shewed cause. The arbitrator had power, under this order of reference, to direct a verdict to be entered for the defendant on the second issue. The words, the defendant "admitting his liability to the plaintiff in respect of the several matters alleged in the declaration," are not inconsistent with the liability having been discharged by payment. Besides, the order empowers the arbitrator "to order and determine what he shall think fit to be done by either of the parties" "respecting the matters in dispute;" and those words are large enough to authorize the present award. Even if the objection were a valid one, it is not competent to the plaintiff to take it. He acquiesced in the view which the arbitrator took of his powers under the order of reference, at a time when, if he had not done so, the defendant might have applied to the Judge who tried the cause, and have got the order amended; and it is now too late for him to take the objection. In *Tomes v. Hawkes* (a), a mere parol submission was entered into, and no express authority to enter a verdict was given; yet the Court refused to set aside a verdict entered in pursuance of a certificate by the

(a) 10 A. & E. 32; S. C. 2 P. & D. 248.

referee that "a verdict ought to be entered for the defendant." [They also contended, that any application respecting the *postea* should be made to the Judge who tried the cause, and not to the Court; and that the present application, which was in effect to set aside the award, was made too late, the rule not having been obtained within the first four days of Term (a); but as no judgment was given on these points, the argument is omitted.]

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Shee, Serjt., *Creasy*, and *Brammoell*, in support of the rule. According to the terms of this order of reference, all that the arbitrator was empowered to do, was to ascertain the amount of damages. He had no authority to direct a verdict to be entered for the defendant on the second issue; *Donlan v. Brett* (b); *Hayward v. Phillips* (c). [They also contended that the plaintiff was not precluded from taking the objection by what passed before the arbitrator.]

Cur. adv. vult.

COLERIDGE, J., delivered the following judgment.—

This was a rule to set aside the *postea*, judgment, and all subsequent proceedings, under the following circumstances. The declaration was for work and labour, goods sold and delivered, and bargained and sold, money paid, and on an account stated; the pleas were non assumpsit, and payment, with acceptance in satisfaction, by third parties, whose names were unknown to the defendant. Issues were taken on these pleas, and the cause came on for trial at the Summer Assizes for Surrey, 1849, when, after being part heard for a day, it was referred on the second morning; and the ques-

(a) See, however, *Manser v. Heaven*, 3 B. & Ad. 295. *Doe d. Madkins v. Horner*, *Per Curiam*, 8 A. & E. 235; S. C. 3 N. & P. 344. *Brooks v. Parsons*, 1 D. & L. 691. *Watson on Awards*, p. 272, 3rd ed., and *Russell on Awards*, pp. 662, 3.
(b) 2 A. & E. 344; S. C. 4 N. & M. 854.
(c) 6 A. & E. 119; S. C. 1 N. & P. 288.

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tion intended to be submitted to me is, whether the arbitrator, who has directed a verdict to be entered for the defendant on the second issue, has not in so doing misconstrued the order of reference and exceeded his jurisdiction; the plaintiff contending that he had no power except to reduce the verdict. Upon the argument with a view to this question, much was stated by the counsel on both sides as to the understanding on which the reference was agreed to, and as to what passed before the arbitrator on the subject when the hearing before him commenced: the Lord Chief Baron's notes of the terms which were to be embodied in the order are also set out in one of the affidavits; but as there is no entire agreement upon these points, and as the Court is not released from deciding this rule on strictly legal grounds, I think I am reduced to inquire first, whether, under the circumstances apparent or stated on the affidavits, it is open to me to consider the propriety of the arbitrator's finding at all; and secondly, if it be, whether, looking at the order of reference only, he has exceeded his jurisdiction.

Now, as to the first, the award was published on the 20th of December last, and the order referred merely the cause, with power to determine what should be done by either of the parties respecting the matters in dispute, and a verdict was taken at the assizes, subject to the award. No motion has been made, nor can be now, directly to set aside the award, or for a new trial; nor is there any imputation made in the affidavits amounting to a charge of fraud. Therefore, although the Court retains its jurisdiction over the *postea* and judgment, I should be slow to interfere, on the ground that I should be doing indirectly for the plaintiff, and unsatisfactorily, that which by his own laches he has disabled himself from calling on the Court to do directly. But there is a sufficient ground on which I think the rule ought to be discharged. It is sworn that, at the first meeting before the arbitrator, the defendant's counsel objected to proceeding without an amendment of the order,

alleging it to be doubtful whether, as it stood, it was so worded as to enable the arbitrator to find for his client on the second issue; that the plaintiff's counsel contended that it was, and the arbitrator expressed the same opinion, saying that "he could, on its being proved that the amount paid to the plaintiff was sufficient, direct a verdict to be entered for the defendant on that issue;" and that the arbitration was proceeded with to the end on that footing. Here then was notice to the plaintiff that the defendant insisted on the question before the arbitrator not being merely one of amount, and that he ought to be at liberty to contend for the general verdict. The plaintiff's counsel concurred in this view, and the arbitrator openly expressed the same opinion. It cannot be denied, then, that the defendant's counsel was thereby deprived of his opportunity of applying to the learned Judge to amend the order of nisi prius, if it did not properly bear this interpretation as it stood. It is therefore now clearly too late, and would have been too late even within the first four days of Hilary Term, to make any application on the ground of this misconstruction; for the plaintiff has in effect consented to the proceeding on this view of the order.

This rule must therefore be discharged.

Rule discharged.

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May 22, 23.

PENKIVILLE v. CONNELL.

[In the Exchequer of Pleas.

Coram *Pollock, C. B., Alderson, B., Rolfe, B., and
Platt, B.*]

Where a shareholder in a joint stock company, who had, together with other shareholders, made a joint and several promissory note, was sued in his several capacity, the Court refused to stay the action under sect. 73 of the Joint Stock Companies Winding-up Act, (11 & 12 Vict. c. 45.)

A RULE was obtained in last Term, calling on the plaintiff to shew cause why all proceedings in this action should not be stayed, until the plaintiff should have made proof of his debt before the Master appointed to wind up the affairs of the Royal Bank of Australia, the defendant being sued as a member of that company.

The rule was granted on the affidavit of the defendant, from which the following facts appeared. The action was brought to recover 200*l.*, the amount of a promissory note made by the defendant, who was one of the directors, shareholders, and contributories in a certain joint stock company established in 1840 in the city of London. The company consisted of more than one hundred members, or partners, and was established for the purpose of carrying on the business of bankers in London and in the colonies of New South Wales. On the 4th of February, 1850, one of the shareholders and contributories petitioned the Lord Chancellor, under the Joint Stock Companies' Winding-up Acts, 1848 and 1849, praying that it might be referred to one of the Masters of the Court to wind up the affairs of the company. The petition came on for hearing on the 26th of March, 1850, before Vice Chancellor Knight Bruce, who ordered that the company should be dissolved and wound up under the provisions of the act; and the Master to whom the winding up was referred, shortly afterwards appointed an official manager. The promissory note, on which the action was brought, was made and issued by the defendant as one

of the directors of the company. The affidavit concluded by averring, that the defendant was advised that he was sued in this action as a contributory of the company, and that on payment of the amount to be recovered in this action, he would be entitled to recover from the shareholders and contributories of the company for the amount he might be compelled to pay in this action.

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The promissory note on which the action was brought was in the following form :

“ We, the Directors of the Royal Bank of Australia, for ourselves and the other shareholders of the said company, jointly and severally promise to pay the sum of 200*l.* on demand.”

The note was signed by the defendant and other directors.

Sir *F. Thesiger* shewed cause (a). This is an application under the Joint Stock Companies' Winding-up Act, 11 & 12 Vict. c. 45. Sect. 73 enacts, that “after the first appointment of an official manager, no creditor or other person shall, except so far as the Master shall permit, have power to commence, or to proceed with, any action against the official manager, or against the company, or any other person representing the same, or who is sued as a contributory thereof, until after proof, or exhibiting or making such proof as he may be able, of his debt or demand before the Master, as hereinafter mentioned; and it shall be lawful for any Judge of the Court in which such action shall be pending, upon summons taken out before him for that purpose, to order that all further proceedings in such action shall be stayed, until after such proof shall have been made or exhibited before the Master.” Here, however, there is a clear answer to the application. The promissory note on which the present action is brought is joint and several; the debt, therefore, is several, and the

(a) The case was argued partly on the 22nd, and partly on the 23rd of May.

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case is the same as if there had been several notes, one made by each of the makers of the note. The defendant, as the maker of this note, is not a contributory. The act was intended to protect shareholders who are only jointly liable, and was passed to avoid the difficulties of pleading in abatement which would occur if so large a number would have to be joined. [*Alderson*, B.—The act is intended to protect those who substantially are jointly liable; this is an action substantially brought against an individual.] In *Healey v. Story* (a), the defendants, who were directors of a joint stock newspaper company, made a promissory note, by which they jointly and severally promised to pay Mr. E. H., or order; and it was held, that “jointly and severally” was equivalent to jointly and personally; and therefore that the defendants were personally liable.

Ogle, in support of the rule. The object of the act is more extensive than is suggested. By the interpretation clause, “the word ‘contributory’ shall include every member of a company, and also every person liable to contribute to the payment of any of the debts, liabilities, or losses thereof.” Here the defendant was a contributor; he signed the note making himself and his co-directors liable. [*Platt*, B.—But he is *sued* on his several liability.] The debt is the debt of the company; and although the action is brought against him as an individual, he has a right to look to the rest of the shareholders for repayment. The Legislature intended, that if the official manager were satisfied as to the validity of the claim, it should be a debt against the company and be proved under the act. The act has also a further intention. The act 7 & 8 Vict. c. 110, s. 66, had directed, that where judgment has been obtained against a joint stock company, before proceeding against individual members of the company due diligence must be used to obtain

(a) 3 Exch. 3.

satisfaction from the assets of the company ; but the present act gives a more convenient method of distribution. By sect. 76, the official manager is to make out a list of the contributors ; that is the foundation of the liability to the debts of the company. Then, by sect. 79, every person included in the list is, unless cause be duly shewn by him to the contrary to the satisfaction of the Master, concluded thereby ; and by sect. 81, persons whose names are on the list may summon others whose names are not on the list, to shew cause why their names should not be included in the list. It is, therefore, of great importance to the defendant that his name should appear on the list, because it is conclusive evidence against other shareholders in the company. [*Alderson*, B.—Here the creditor did not choose to trust the company ; he trusted the individual. *Pollock*, C. B.—The defendant is here sued as a separate maker of a joint and several promissory note.] [He then referred to *Thompson v. The Universal Salvage Company* (a).]

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POLLOCK, C. B.—We are of opinion that this rule must be discharged. If, when the rule nisi was moved for, the facts had been known as they now are, the rule would never have been granted. The defendant is sued as the maker of a joint and several promissory note. It is, as Sir *F. Thesiger* put it, as if there were several notes, and the defendant were sued upon the one made by him. I think he may be sued on his several liability, without compelling the plaintiff to go to the Master's Office. All that the plaintiff at the trial of this cause need prove, is the handwriting of the defendant to a several note.

ALDERSON, B.—I am of the same opinion. The Court is only empowered to stay those actions which are substantially brought against the defendant as a member of the company. It must be an action in which he is liable as

(a) 3 Exch. 310 ; S. C. 6 D. & L. 465.

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contributory, because the debt is the debt of the company ; but here, by the form of the note, the defendant is separately liable.

ROLFE, B.—I am of the same opinion. The case is the same as if the defendant had made the note as a guarantee for the company. As to the hardship mentioned by Mr. *Ogle*, the ordinary means remain to the defendant to get his name put on the list as a contributory, which he can adopt if he chooses.

PLATT, B.—The only question is, whether the defendant in this action filled any of the characters mentioned in the act. He did not; he was sued in his individual capacity on his separate liability.

Rule discharged.

May 23.

GLENNIE v. DELMAR.

[In the Exchequer of Pleas.

Coram *Pollock, C. B., Alderson, B., Rolfe, B., and Platt, B.*]

A clerk in the Privy Council Office, whose duties are performed at that office, does not "carry on his business" there, within sect. 60 of the County Courts' Act, (9 & 10 Vict. c. 95).

THIS was a rule to enter a suggestion to deprive the plaintiff of costs under the County Courts' Act (9 & 10 Vict. c. 95).

The affidavit of the defendant, upon which the rule was granted, stated, that "the defendant was clerk of the Privy Council Office, and carried on his business at the

Office of the Privy Council, Whitehall, within the jurisdiction of the Westminster County Court of Middlesex." It also negatived the exceptions of the 128th section.

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Martin shewed cause. Section 60 of the County Courts' Act, (9 & 10 Vict. c. 95), on which the present question depends, enacts, that the summons may issue "in any district in which the defendant or one of the defendants shall dwell or carry on his business at the time of the action brought." In the present case it is not suggested that the defendant dwells within the Westminster district; and the only question is, whether he can be said to "carry on his business" in that district within the meaning of the act. That question, however, has been already decided in the negative by this Court in the case of *Buckley v. Hann* (a), which was a decision under the City of London Small Debts Act, 10 & 11 Vict. c. lxxi, the words of which are precisely similar to those used in the County Courts' Act. In that case, the affidavits stated that the defendant was a clerk in the Admiralty, and as such, daily attended at the office called the General Register and Record Office for Seamen, No. 70, Lower Thames Street; and the Court held, that the case was not within the words of the section, inasmuch as the clerk who served in the office in the city, could not be considered as carrying on an independent business within the meaning of the act. In *Rolfe v. Learmonth* (b), the Court of Queen's Bench held, that the deputy sealer in the Court of Chancery, who follows the person of the Lord Chancellor, sometimes acting in Westminster Hall, sometimes in the House of Lords, and sometimes also in Lincoln's Inn, and at the Great Seal Patent Office, in Quality Court, had no fixed place of business within the meaning of the act. Here the defend-

(a) Exch. Argued in last Mich. Term, and will be reported in 7 D. & L.

(b) Q. B., Mich. Term, 1849, cited from 19 Law Journ., Q. B. 10.

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ant cannot be said to have carried on his business at the Office of the Privy Council.

Hawkins, in support of the rule. "Business," in Johnson's Dictionary, is said to mean "employment;" here the defendant's "business," that is, his "employment," is carried on at the Privy Council Office. [*Pollock*, C. B.—He is only a servant, he does not carry on *his* business there.] *Buckley v. Hann* (a), is distinguishable; there the affidavit only stated that the defendant daily attended at the office.

POLLOCK, C. B.—This rule must be discharged. The only point is, whether a person who is a clerk in the Privy Council Office, carries on a business within the meaning of the act. I think not; it is true that business may mean any occupation, but carrying on a business means more; it means not merely a service.

ALDERSON, B.—I am of the same opinion. The defendant does not carry on a business at any fixed place.

ROLFE, B.—If it is a business at all, it is a moveable business; but I think it is not a business at all. We are not now called on to decide the question, but I think that the foreman of a shop cannot be said to carry on a business at his master's shop.

PLATT, B., concurred.

Rule discharged.

(a) See *ante*, p. 403, note (a).



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In the matter of *The APOTHECARIES' COMPANY v. BURT.*

May 21.

[In the Exchequer of Pleas.

*Coram Pollock, C. B., Alderson, B., Rolfe, B., and
Platt, B.]*

A RULE was obtained last Term calling on the Judge of the County Court of Cambridgeshire and the plaintiffs to shew cause why a writ of prohibition should not issue to prohibit the said Court from further proceeding in this plaint.

The summons in the plaint required the defendant “to appear at the County Court,” “and to answer the plaintiffs in an action on contract, for illegally practising as an apothecary.

| | £ | s. | d. |
|---|-----|----|----|
| “Debt, or claim | 20 | 0 | 0 |
| Cost of summons and service | 1 | 9 | 0 |
| Paying money into and out of Court, entering satisfaction, &c. | 0 | 1 | 8 |
| Calling cause | 0 | 0 | 0 |
| | £21 | 10 | 8 |

“See particulars annexed,” &c.

The particulars referred to stated that the action was brought “to recover the sum of 20*l.* For that after the 1st of August, 1815, mentioned in” the 55 Geo. 3, c. 194, (the Apothecaries’ Act), “and before the commencement of this suit, to wit, on the 17th of November, 1849, and on divers other days, the defendant (not being a person who, on or before the 1st of August, 1815, was practising as an apothecary) did practise as an apothecary in England, and within the jurisdiction of this Court, that is to say, in

The summons in a plaint in the County Court stated that the sum sued for was 20*l.*; but the particulars stated, that the plaint was issued to recover 20*l.*, under the Apothecaries’ Act, 55 Geo. 3, c. 194, (sect. 20 of which imposes a penalty of 20*l.* upon every uncertificated person practising as an apothecary), and stated four occasions on which the defendant had practised. *Held*, upon motion for a prohibition, that the amount recoverable was limited by the sum named in the summons and particulars, and, therefore, that the County Court had jurisdiction.

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Upwell," and three other places mentioned, "by then and there, as such apothecary, attending and advising and furnishing medicines to and for the use of certain persons, to wit, one George Swan," and three other persons named, without having obtained a certificate, &c.; "whereby and by force of the statute" (55 Geo. 3, c. 194) "the defendant forfeited for his said offence the sum of 20*l.*, which sum of 20*l.* so forfeited this action is brought to recover." It was contended in moving for the rule, that the particulars shewed that the plaintiffs sought to recover, or might recover, four several penalties of 20*l.* each, and, therefore, that the cause of action was not within the jurisdiction of the County Court.

Martin and *F. Robinson* shewed cause. The plaint was issued for penalties under the Apothecaries' Act, 55 Geo. 3, c. 194, the 20th section of which enacts, that every person practising as an apothecary without a certificate, "shall for every such offence forfeit and pay the sum of 20*l.*;" which penalty, it is provided by sect. 26, shall "be recovered" by the Apothecaries' Company "in any of his Majesty's Courts of record in England and Wales." The cause of action in this case is clearly within the jurisdiction of the County Court; for sect. 58 of the 9 & 10 Vict. c. 95, enacts, "that all pleas of personal actions, where the debt or damage claimed is not more than 20*l.*," "may be holden in the County Court," and the present claim does not exceed that amount. It was said on the other side, that the plaintiffs sought to recover four penalties; but it is obvious from the summons and the particulars that they only go for one. The fact of four different penalties appearing from the particulars to have been incurred, cannot affect the jurisdiction of the Court to try the plaint. When one act of attendance or of supplying medicines had been proved, it would be the duty of the Judge of the County Court to prevent the plaintiffs from going on to prove other attendances. At all events, if the plaintiffs

proved four offences, they could not recover more than 20*l.*, and would be obliged to abandon the excess; for sect. 63 provides, that “any plaintiff having cause of action for more than 20*l.*, for which a plaint might be entered under this act if not for more than 20*l.*, may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding 20*l.*” On the trial of this case, therefore, the plaintiffs might abandon all but one penalty; indeed, by the form of the summons and particulars they must be taken to have done so. The particulars, it is true, may not be well framed; and if they were a count in a declaration, they might be held bad for duplicity: but the jurisdiction of a Court cannot depend upon the accuracy of the form in which the claim is made.

But further; the attendance by the defendant upon four different patients, as described by the particulars, constitutes but one offence. [*Alderson*, B.—Suppose the defendant had attended four persons at the same time, and in the same room, would that be only one offence?] Clearly so. The words of the act are nearly the same as those used in the Sunday Trading Act, 29 Car. 2, c. 7, on which *Crepps v. Durden* (a) was decided. Lord *Mansfield* there said, “There is no idea conveyed by the act itself, that if a tailor sews on the Lord’s Day, every stitch he takes is a separate offence.” [They also referred to *Rex v. Lovet* (b), and *The Apothecaries’ Company v. Bentley* (c).]

Naylor, in support of the rule. The particulars state that the defendant practised four times, at four different places, and on four different patients; therefore, if the Judge heard the case, and disposed of it on the evidence of one practising, fresh actions might be brought for the other three cases. If the plaintiffs had intended abandon-

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(a) Cowp. 640, 646. See how-
ever *Brooke v. Milliken*, 3 T. R.
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(b) 7 T. R. 152.
(c) 1 C. & P. 538; S. C. R. &
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ing the excess above 20*l.*, that should have appeared on the particulars. In *Vines v. Arnold* (*a*) it was held, that where the debt due from the defendant to the plaintiff was above 20*l.*, the levying a plaint in the County Court for less than that amount was not an abandonment of the excess. *Talfourd*, J., there says, "I think that the Legislature intended that there should be some act of abandonment in Court, because they have provided for an entry of the abandonment being made in Court." But in the present case the plaintiffs could not abandon the excess, for two reasons: First, they have no power to abandon a portion of a penalty given by act of Parliament; and, secondly, they cannot abandon the whole of it, for half of it is, by the 25th section, to go to the informer; and the plaintiffs, therefore, even if they could abandon any portion, could abandon only their own share.

POLLOCK, C. B.—The rule must be discharged. I do not see any clear ground to make this Court prohibit the County Court from proceeding with and trying the case. The claim is limited by the summons and particulars to 20*l.* The particulars, it is true, are ambiguous and may give rise to questions under the Apothecaries' Act, but they need not now be answered. The County Court has jurisdiction whenever the claim does not exceed 20*l.*, or the plaintiff is willing to abandon the excess.

ALDERSON, B.—I do not see that the plaintiffs shew a claim exceeding 20*l.*; therefore the question as to whether there should be an abandonment does not arise. The claim is limited by the plaintiffs, in the summons and particulars, to 20*l.*; there is, therefore, no ground for a prohibition.

ROLFE, B.—I am of the same opinion; this is a personal

(*a*) Com. Pleas, Mich. Vac. 1849, cited from 19 Law Journ., C. P. 98, will be reported in 7 D. & L.

action for a sum not exceeding 20*l.*, which may be brought in the County Court, the plaintiffs going only for 20*l.* They state in their particulars something from which we see that they might perhaps have gone for more; but whether they are separate rights of action we need not now decide.

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PLATT, B.—Before a prohibition is granted, the Court should be sure of the grounds on which it rests. All that is shewn here is, that the plaintiffs might have possibly gone for more.

Rule discharged.

ROSS v. NORMAN.

May 27.

[In the Exchequer of Pleas.

Coram Pollock, C. B., Alderson, B., Rolfe, B., and
Platt, B.]

CASE. The declaration stated, that the defendant not having any reasonable or probable cause of action whatsoever against the plaintiff, to the amount for which the defendant maliciously caused him to be arrested as after mentioned, "but wrongfully and unjustly contriving," &c., "wrongfully, falsely, maliciously, and unjustly procured

In an action on the case for maliciously suing out a ca. sa., and causing the plaintiff to be arrested under 1 & 2 Vict c. 110, an allegation that

the defendant falsely, maliciously, and unjustly procured an order from a Judge, by *falsely and maliciously representing to the Judge that the plaintiff was justly and truly indebted to the defendant in the sum of, &c., by means of a certain false affidavit then shewn and uttered by the defendant before the Judge*, is good on special demurrer; and the declaration need not set out the false statement or charge by which the Judge was induced to make the order; nor need it allege that the facts on which the defendant relied in his statement before the Judge, were false to his knowledge, or that he had not reasonable or probable cause to suppose them to be true.

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from" *Patteson*, J., an order to issue a *capias* against the plaintiff, to hold him to bail for 151*l.* 18*s.* 7*d.*, "by falsely and maliciously representing to the said Sir *J. Patteson*, that the now plaintiff was justly and truly indebted to the now defendant in the said sum of 151*l.* 18*s.* 7*d.*, by means of a certain false affidavit then shewn and uttered" before *Patteson*, J. That afterwards, to wit, &c., the defendant wrongfully and maliciously sued out a *capias*, directing the sheriff of Middlesex to take the plaintiff, and keep him until he should have given bail, or made deposit in an action on promises, at the suit of the defendant; which writ was indorsed for bail for the said sum of 151*l.* 18*s.* 7*d.* Averment, that the defendant afterwards, &c. "contriving and intending as aforesaid, falsely and maliciously, and without having any reasonable or probable cause of action whatsoever against the now plaintiff to the amount for which the now defendant caused the now plaintiff to be arrested," caused the plaintiff to be arrested by virtue of the writ, and to be detained in custody for a long time, to wit, until the plaintiff, in order to obtain his liberation, deposited with the said sheriff the sum indorsed on the writ, and the further sum of 10*l.*, for costs, according to law, &c. The declaration then proceeded to deny that the defendant had any reasonable or probable cause of action against the plaintiff, to the amount for which the defendant caused him to be arrested, or for which the plaintiff ought to have been arrested or holden to bail; and concluded by stating, that the defendant did not prosecute his action against the plaintiff, but permitted it to be discontinued.

Special demurrer, and joinder.

Needham, in support of the demurrer. The declaration is bad on two grounds. First. It does not set out the false statement or charge by which the Judge was induced to make the order; and, secondly, it does not shew that the circumstances on which the defendant relied in his statement before the Judge, were knowingly or wilfully false, or that

the defendant had not reasonable or probable cause to suppose that the statements which he made were true. In *Daniels v. Fielding* (a), which was a similar action, the allegation in the declaration was, that "the defendants" "not then having any reasonable or probable cause to believe that the plaintiff was about to quit England, but contriving, &c., falsely and maliciously, and without any reasonable or probable cause, caused and procured Sir John Patteson, Knt., one of the justices, &c., to make his certain order in writing," &c. The declaration was there held to be good after verdict; the Court thinking that after verdict, the word "falsely," in reference to the context, must be taken to mean, "by false evidence," or "by means of falsehood." But the Court in giving judgment in that case said: "It is essential, under the present statute, that the plaintiff in an action for a malicious arrest should allege falsehood or fraud in obtaining the original order. The action is in its character similar to an action for a malicious prosecution on a criminal charge, and the declaration ought therefore, in analogy to the course of pleading in such actions, to state what the false charge or statement was by which the Judge has been misled. Now the declaration in this case contains no such statement, and indeed seems throughout to be framed on the erroneous notion, that the gist of the action is the arresting by the defendants, at a time when they had no reasonable or probable cause for believing that the plaintiff was going abroad. This, as we have already explained, is an error." [*Pollock*, C. B.—Why should not the facts be set out as to the existence of reasonable and probable cause? When the facts are proved, the question of reasonable or probable cause is for the Judge; *Panton v. Williams* (b).] Knowledge is of the very essence of the averment; for unless the defendant knew what he stated in

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(a) 16 M. & W. 200, 7; S. C. 4 D. & L. 329.

(b) 2 Q. B. 169.

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the affidavit to be false, there would be no cause of action. Two ingredients are necessary to give the plaintiff a right of action: the statement must be false, and the Judge must have acted on it; otherwise the slightest mistake in a sum named in the affidavit would be actionable. The question is, not whether the defendant had a reasonable or probable cause of action, but whether *he believed* he had reasonable and probable cause; and that would be put in issue by the plea of not guilty.

Hugh Hill, in support of the declaration. The allegation of falsehood and malice is in the proper place, and follows all the precedents. A similar form is to be found in 2 *Chitty on Pleading*, 438, 7th ed. The precedents in actions on the case for deceit on the sale of goods are also similar; as in *Mumery v. Paul* (a). The language here is, "by falsely and maliciously representing," &c., "by means of a certain false affidavit." [*Reply, R.*—The words "falsely and maliciously," are mere words of vituperation. The declaration does not state that the affidavit was made by the plaintiff: it may have been made by any other person.] All that is said in *Dennis v. Farning* &c. is, that the plaintiff should allege falsehood or fraud in obtaining the order. There is an allegation at the commencement of the declaration of want of reasonable cause, and malice is alleged at every step: all that is necessary is malice and absence of reasonable cause.—these must be proved by the plaintiff, and would be put in issue by the plea of not guilty.

Norris, in reply. It is not disputed that the motive is essential: then, if it is meant that the allegation in the declaration is a statement to the extent that the affidavit was false within the knowledge of the plaintiff that does

a : C. R. 11, S. C. 4 D. & L. 322.
P. 11 M. & W. 201, S. C. 4 D. & L. 322.

not sufficiently appear; if it is meant only that the affidavit is false in fact, that is immaterial. In *De Medina v. Grove and Others* (a), it was held, that no action would lie against an execution creditor or his attorney for issuing a fi. fa. indorsed to levy the whole sum recovered, which to the knowledge of both had been partly satisfied by payment; unless malice and want of probable cause were alleged in the declaration and proved. Lord *Denman* there said, in delivering the judgment of the Court, "if malice and want of reasonable and probable cause had been alleged, they would have formed the gist of the action." There it was clear from the facts that the defendant had no right to arrest the plaintiff, but notwithstanding that, the Court held the allegation to be necessary.

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The Court having intimated an opinion that the declaration was sufficient,

Needham prayed leave to withdraw the demurrer, and plead over.

PER CURIAM.—The defendant may plead over on the usual terms; otherwise,

Judgment for the Plaintiff.

(a) 10 Q. B. 152, 168.



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May 28.REGINA v. The SHERIFF OF LEICESTERSHIRE,
in a cause of
ARDEN v. BINGHAM.

[In the Common Pleas.

Coram *Wilde, C. J., Maule, J., Cresswell, J., and
Williams, J.*]

Although the 5 & 6 Vict. c. 98, s. 31, enacts, that if a debtor in execution escape, the sheriff shall be liable only to an action upon the case for the damage sustained by the plaintiff, the Court will grant an attachment against the sheriff for returning the escape.

The Court, however, will, in such a case, measure the amount of the fine to be imposed upon the sheriff, by the damage sustained.

Where, therefore, an attachment was issued against the sheriff for returning an escape, the

Court gave the plaintiff liberty to bring an action against the sheriff to ascertain the amount of damage, and stayed the proceedings upon the attachment in the meanwhile.

A RULE was obtained in last Hilary Term, calling upon the late sheriff of Leicestershire to shew cause why an attachment should not issue against him for contempt.

It appeared that upon being ruled to return a writ of *ca. sa.* which had been delivered to him for execution against the defendant, he had returned that he had taken the defendant, but that the latter had, immediately after his arrest, escaped and gone at large, and was not at the date of the return in the sheriff's custody. The amount of the debt was 2690*l.*

Channell, Serjt., in the same Term, shewed cause upon an affidavit sworn by the sheriff's officer, stating that he had arrested the defendant on his return from his father's funeral, within a few yards of the house of the defendant's brother; that he had been prevailed upon by the latter to suffer the defendant to go into the house; and that after passing a short time there, they prepared to depart, but that as the officer was in the act of taking down the step of the carriage, the defendant suddenly ran back into the house and effected his escape. The 5 & 6 Vict. c. 98, s. 31, has taken away the action of debt against the sheriff for an

escape, and has substituted in its place an action on the case by which the plaintiff may recover, not the amount of the debt due to him by the defendant, but damages for the loss which he has actually sustained by the escape. It is submitted, therefore, that since this alteration in the law, the Court cannot issue an attachment against the sheriff for making a return which, although insufficient in law, and therefore in a technical sense a contempt of Court, is nevertheless not a contempt in the more obvious meaning of the term. Before the passing of the 5 & 6 Vict. c. 98, a rule for an attachment against the sheriff was in practice treated as merely a security for the debt, and was generally resorted to as a shorter and more summary method of recovering it than an action; because that was the measure of fine imposed upon him for his contempt, and the attachment was never enforced if he paid the amount of the debt. As the Legislature, however, has declared that the sheriff shall no longer be liable to pay the debt, but only to pay such damage as the plaintiff has actually sustained, the Court, which has no means of ascertaining the amount of that damage, will, it is submitted, not issue an attachment, but will leave the plaintiff to his remedy by action.

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Lush, in support of the rule. The return of the sheriff is, in law, no return: he has, therefore, been guilty of a contempt of Court by disobeying its order; and the Court will therefore issue an attachment against him. This has been the invariable practice; and in no instance has the Court granted the indulgence now asked for. [*Wilde*, C. J.—We should act very much against the spirit of the recent statute if we were to amerce the sheriff in the full amount of the debt.] How the Court may be disposed to deal with the sheriff, is a question which will arise when the attachment has issued. At present, it is only contended that an attachment ought to issue.

WILDE, C. J.—The usual practice has undoubtedly been to grant an attachment; but it is perfectly plain that the

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Legislature has in the most distinct manner declared that the amount which the sheriff shall be liable to pay shall be, not the amount of the judgment debt as heretofore, but the damage actually sustained by the plaintiff by the escape. In conformity with the established practice, however, we shall issue the attachment, leaving the sheriff to apply to the Court as he may be advised. The Court will then consider what fine shall be imposed upon him. The rule will, therefore, be made absolute for an attachment—to lie in the office until the first six days of next Term.

The rest of the Court concurred.

Rule accordingly.



Channell, Serjt., having, in the following Term, obtained a rule calling upon the plaintiff to shew cause why all further proceedings upon the above rule, and upon the attachment issued in pursuance of it, should not be stayed, upon payment by the late sheriff to the plaintiff of such sum or the performance of such terms as the Court might direct; or why it should not be referred to the Master to ascertain what damages, if any, had been sustained by the return of the escape of the defendant, and why the attachment should not remain in the office until the Master should have made his report :—

Byles, Serjt., *Lush*, and *J. Karlake* now shewed cause (a). The first question is, whether the 5 & 6 Vict. c. 98, has altered the terms upon which the Court will relieve the sheriff from the consequences of his contempt. Before that act, and while the stat. Westm. 2, c. 11, which gave the plaintiff an action of debt against the sheriff for an escape, was in force, the Court never relieved him, except upon payment of the debt and costs,—[*Wilde*, C. J.—That is,

(a) Before *Wilde*, C. J., *Maule*, J., *Cresswell*, J., and *Talfourd*, J.

in an action,]—or upon an attachment; even where the attachment was for neglect to arrest upon mesne process. The 5 & 6 Vict. c. 98, s. 31, it is true, in substituting an action on the case for the action of debt, has limited the amount recoverable from the sheriff for an escape to the damage actually sustained; but it does not follow that the Court, when called upon to punish its officer for contempt, will limit the fine to that amount. It is clear, that if the escape in this case had taken place in executing mesne process, the Court would not have discharged the sheriff from the attachment except upon payment of the debt and costs; and he ought not to be dealt with more indulgently when his neglect has arisen in executing a writ of *ca. sa.* after judgment recovered.

But, secondly, even if the amount of the damage actually sustained is to be the measure of the fine, the burthen of proving that the damage falls short of the debt and costs for which the defendant was taken must fall upon the sheriff. [*Wilde*, C. J.—Suppose an action on the case were brought for an escape upon mesne process, where would the onus rest? *Maule*, J.—The plaintiff would have to prove that the defendant was indebted to him in the amount for which the writ was issued. Would you have him sever his evidence as to the amount of damage which he has sustained?] It is submitted that proof of the escape is proof of damage sustained to the amount indorsed on the writ, and that it is for the defendant to cut down the damages if he can.

Channell, Serjt., and *H. Hill*, in support of the rule. It is admitted that the return is insufficient and that the plaintiff is entitled to an attachment; but the question is whether, since the Legislature has expressed an intention that the liability of the sheriff shall not extend beyond the amount of the injury actually sustained from the escape, the Court will impose a different liability upon

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him. It is clear that if the plaintiff had resorted to an action, he would have recovered no more than the value of the detention of the defendant; *Clifton v. Hooper* (a); and he ought not to recover more because he has adopted another remedy.

WILDE, C. J.—This case comes before us upon two grounds. First, a contempt of the authority of the Court has been committed, in not using due diligence in executing its process; and the Court has, therefore, to vindicate its authority. In doing this, it has always been in the habit of inquiring what injury has been done to the suitor, and measuring the fine to be imposed for the contempt by the extent of that injury. The questions, therefore, in this case are, first, what fine we are to impose upon the sheriff for his contempt; and next, in measuring the amount of that fine, by how much it ought to be increased in respect of the injury sustained by the plaintiff. In considering the latter question, some assistance is afforded to us by the Legislature, which has pointed out how we are to exercise our discretion. For a long time the rule was, that the plaintiff should recover from the sheriff the amount of the debt; but as this was productive of much injustice, the Legislature passed a law directing that the remedy should be damages for the amount of the injury really sustained. The Court should, therefore, attend to this provision of the Legislature, and be guided by it in measuring the amount of the fine. Certain materials are now laid before us for the purpose of enabling us to estimate the amount of injury suffered by the escape: but they are of a most uncertain and unsatisfactory nature; for they are brought before us by affidavit,—a mode of adducing evidence which affords no means of extracting the truth from unwilling witnesses, and leaves every one at liberty to state as much

(a) 6 Q. B. 468.

or as little of the truth as he pleases. It therefore seems to us, that the proper and just course to pursue will be to let the attachment stand over, with liberty for the plaintiff to bring an action against the sheriff. At the same time, considering that the plaintiff has sustained an injury, and that he ought to have the assistance of the Court, we shall, if the plaintiff should prefer a reference, be ready to consider how far it may be proper to grant it. This, of course, will not prevent the parties from doing that which good sense would suggest that they should do, viz., come to some compromise. This rule will, therefore, be enlarged till further order; the plaintiff to be at liberty to bring an action against the sheriff, who shall plead the general issue only, and admit the judgment, execution, caption and escape. If the declaration be objectionable in point of form, the defendant may apply to a Judge at Chambers; the question of mala fides not to be raised; the judgment to be entered as of this day; and no writ of error to be brought on account of the discrepancy which will thus appear upon the record; without prejudice, however (counsel on both sides consenting), to either party tendering a bill of exceptions or moving for a new trial.

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The rest of the Court concurred.

Rule accordingly (a).

| | |
|---|---|
| (a) In the same Term (June 11) it was, by consent of counsel, made one of the terms of the rule | that the action should not abate by reason of the death of the sheriff. |
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May 28.

HAND v. DANIELS.

[In the Common Pleas.

Coram *Wilde, C. J., Maule, J., Cresswell, J., and Talfourd, J.*]

The affidavit in support of a rule for a suggestion to deprive plaintiff of costs under the County Courts' Act, stated, that at the time of the commencement of the action, plaintiff dwelt at A., within one mile of B., the residence of defendant; *Held* insufficient, because it did not shew that the place described as the defendant's residence was his residence at the time of the commencement of the action.

THIS was a rule, calling upon the plaintiff to shew cause why a suggestion should not be entered upon the roll to deprive him of costs, "the verdict," in the language of the rule, "found for the plaintiff on the trial of the cause, being for a sum less than 20*l.*, and for the recovery of which a plaint might have been entered in the County Court."

The affidavit of the defendant, upon which the rule was granted, after stating that the action was in detinue, and that a verdict had been found for the plaintiff for 4*l.* 10*s.*, proceeded in the following words: "that at the time of the commencement of this action, and thence hitherto up to the time of swearing this affidavit, the deponent carried on his business of auctioneer at 42, Keppel Street, Russell Square, which is situate in the district of the Bloomsbury County Court of Middlesex, and that at the time of the commencement of this action the plaintiff dwelt at 3, Euston Square, in the county of Middlesex, which is situate within one mile from Harman

Where the Court discharge such a rule by reason of the insufficiency of the affidavit in support of it, the defendant will not be permitted to renew his application.

Semble, per *Maule, J.*, that detinue is an action of contract and not of tort.

Whether the County Courts have jurisdiction in cases of detinue, *quære*.

If they have, whether they can, like the superior Courts, award a delivery of the chattel and a distringas to seize the lands of the defendant, or whether they can only give damages for the detention, *quære*.

If they can only give damages, whether the plaintiff in an action of detinue in the superior Courts obtaining a verdict for less than 5*l.*, can be deprived of his costs under the County Courts' Act, *quære*.

A rule nisi to enter a suggestion to deprive plaintiff of costs under the County Courts' Act, stated as the ground for the suggestion, that the verdict found for the plaintiff was for a sum less than 20*l.*, and for which a plaint might have been entered in the County Court. Whether such a rule be bad on the face of it where the action is in tort, *quære*.

Street, Gray's Inn Road, in the said county of Middlesex, the residence of this deponent."

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L. Thomas shewed cause. There is a preliminary objection to the rule itself. The statement in the rule, that the verdict was for less than 20*l.*, is not inconsistent with the fact that the County Court had no exclusive jurisdiction over the cause of action; for the action was in tort, and the verdict may have been for less than 20*l.*, but more than 5*l.*, the limit of the exclusive jurisdiction of those Courts in tort. [*Maule, J.*—Is detinue tort?] The better opinion is, that it is; 1 *Chit. Plead.*, 135, 7th ed. [*Maule, J.*—I should have thought that the maxim, *noscitur a socio*, was decisive on the point. If detinue be an action of tort, how do you account for that which is perfectly well known, viz., that counts in debt and detinue may be joined, which would be preposterous if the one were contract and the other tort. On the other hand, there is no difficulty in treating detinue as an action of contract. The difficulty alluded to by Mr. *Chitty*, "that detinue lies, although the defendant wrongfully became the possessor" of the chattel "in the first instance, without relation to any contract," may be explained by considering the plaintiff as waiving the tort and treating the defendant in the more favourable situation of a person who rightly became possessed of the chattel in the first instance, and as complaining only of the wrongful detention. *Wilde, C. J.*—But even assuming that detinue is an action of tort, the objection to the rule does not appear sustainable. Is it necessary in any case, except in rules for setting aside awards (which are specially provided for (*a*)), that a rule should set forth the grounds upon which it is granted?] Perhaps not; but if the rule purports to set them forth, it should do so correctly.

Next, the County Court has no jurisdiction in cases of detinue, and the plaintiff therefore is not to be deprived of

(*a*) See Reg. East. Term, 2 Geo. 4, Q. B., 4 B. & A. 539.

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his costs. The judgment which the superior Courts award in detinue is, that the chattel shall be restored, or its value paid; and, further, that the sheriff distrain the lands of the defendant until the chattel be delivered up, or its value levied out of the rents and profits. The County Court has no means of enforcing the specific delivery of the chattel as the superior Courts have, by means of this distringas, and it would be a great hardship on a plaintiff if he were deprived of his costs incurred in obtaining a remedy which the County Court could not afford him. The Legislature intended to deprive a plaintiff of costs only where he resorts to an expensive tribunal for a remedy which can be obtained in a cheap one.

At all events, the defendant's affidavit is insufficient. It does not state that the plaintiff resided, at the time of the commencement of the suit, within twenty miles from the place where the defendant resided at that time; but only that he dwelt within a mile from the present residence of the defendant.

Macnamara, in support of the rule. The objection to the rule is not well founded. Detinue is clearly an action of contract, otherwise that action would offer the anomaly pointed out by Mr. Justice *Maule*, of a joinder of counts in tort and contract. [*Maule*, J.—It is quite clear that an action of debt might be brought for a chattel, if it be not specific,—for a robe, for example, for a corn rent, for fish (a). If a man had a claim to the tenth of every fish which another man caught, and also claimed a part of a specific fish, it is natural that he should be allowed to join those demands together in one action.]

Next, detinue is within the jurisdiction of the County Courts. It is not excepted from the operation of the 58th section of the 9 & 10 Vict. c. 95, which enacts, that all pleas of personal actions where “the debt or damage” is not

(a) See *Brikhed v. Wilson*, Dyer, 24 b, and Com. Dig. (A. 5.)

more than 20*l.*, may be brought in the County Court. It has been held, that detinue is within the 3 & 4 Wm. 4, c. 42, s. 17, which authorizes the trial of causes by the sheriff (a). [*Talfourd*, J.—But there the words are “debt or demand.”] It is submitted, that the County Court may order the specific delivery of the chattel, and award also the distringas to enforce it, in the same way as the superior Courts, for although no form of such judgment has been settled by the Judges, the 78th section directs, that “in any case not expressly provided for” by the act, “or by the said rules, the general principles of practice in the superior Courts of common law may be adopted and applied, at the discretion of the” County Court “Judges, to actions and proceedings in their several Courts.” It has been held by this Court in *Ellis v. Watt* (b), that a summons in the nature of a sci. fa. might be taken out in the County Courts, although the rules settled by the Judges for the practice of those Courts make no provision on the subject. At all events, the plaintiff may recover in the County Court damages for the detention of the chattel, even if he cannot recover the chattel itself, and that is enough to disentitle him to costs if he sues in the superior Courts. [*Wilde*, C. J.—Is the plaintiff to be deprived of the means of recovering his property when its value is less than 20*l.*, or at least to be punished by the loss of his costs if he endeavours to recover it?]

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The affidavit shews with reasonable certainty, that at the time of the commencement of the action the plaintiff dwelt within twenty miles of the place where the defendant dwelt at that time. The words, “at the time of the commencement of this action,” override the whole sentence. But even if the affidavit be defective in this particular, it shews a *primâ facie* case for a rule for a suggestion under the

(a) See *Walker v. Needham*, 3 M. & G. 557; S. C. 1 Dowl. 220, N. S.; 4 Scott, N. R. 222.

(b) Com. Pleas, Mich. Term, 1849. This case will be reported in 7 D. & L.

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County Courts' Act, and that is enough ; *Hayter v. Fish* (a).

WILDE, C. J.—That case was overruled last Term by this Court (b). The affidavit is clearly bad. How could perjury be assigned upon it if it turned out that the defendant had only removed yesterday to the place which he describes as his residence ?

Macnamara asked leave to renew the application upon an amended affidavit, and stated that such leave had been granted in two or three instances, by the Court of Exchequer (c).

WILDE, C. J.—To grant such an indulgence would lead to very great inconvenience. If it is allowed in two or three cases, as it is said to have been by the Court of Exchequer, it will soon be allowed in two or three dozen cases, and finally, in every case. There is no difficulty in making an affidavit in the ordinary form ; and the least care would have prevented such an error as the present. If, however, attorneys or their clerks will not take the trouble to inform themselves properly, parties must suffer the consequences.

The rest of the Court concurred.

Rule discharged.

(a) 6 D. & L. 355 ; S. C. 6 p. 364.
C. B. 568.

(b) See *Kirby v. Hickson*, ante, p. 379.

(c) See *Parry v. Davies*, ante,



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HARLOW *v.* WINSTANLEY.

May 29.

[*Bail Court. Coram Wightman, J.*]

J. PATERSON moved, on behalf of the plaintiff, to make an order of reference of the borough Court of record of Derby, a rule of this Court.

The order of reference was sealed with the seal of the Court, and was made "upon hearing the attornies on both sides, and by their consent," and referred all matters in difference in the cause in the borough Court to the award of R. G., &c. It contained a clause, "that this order may, at the option of either party, be made a rule of her Majesty's Court of Queen's Bench." The order was annexed to an affidavit made by the attorney for the plaintiff, "that the deponent, as the attorney in this cause for the said plaintiff, and John Flewker, as the attorney in this cause for the above named defendant, did, on the 8th day of October last, severally consent to the making the order of reference of that date hereunto annexed: and that the said order is an order of, and is duly sealed with the seal of the Court," &c.

Where an order of reference made by a borough Court of record by consent, contained a clause that it might be made a rule of this Court, and the consent of the parties was also verified by affidavit, this Court, upon motion, directed it to be made a rule of Court.

Paterson. The only difficulty is, that it may be said that this is an application to enforce the order of an inferior Court, by making it a rule of this Court; but it is submitted, that as the order is made by consent, and there is an express clause in it authorizing the application, it may be treated as a mere submission to reference by agreement of the parties, and so come within the ordinary rule.

Master *Bunce* stated that cases had occurred where, in

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actions in the Common Pleas, a clause had been inserted in the order of reference authorizing the order to be made a rule of this Court, by mistake for the Court of Common Pleas, and the order was so made accordingly (a).

WIGHTMAN, J.—I think that in granting this application I need not consider whether it is in effect enforcing an order of an inferior Court. I shall treat it as the ordinary case of a reference by agreement of the parties, containing a clause authorizing the submission to be made a rule of Court.

Application granted.

(a) See *Milstead v. Craufield*, 9 Dowl. 124.

May 7, 31.

In re TOBY, Gent., one, &c.

[In the Queen's Bench.

Coram Lord Campbell, C. J., Patteson, J., Wightman, J.,
and Erle, J.]

The 9 & 10
Vict. c. 95,
s. 91, does not
limit to the
sums therein
mentioned, the
remuneration
which an at-
torney may
recover from
his client, in
respect of a
suit in the
County Court.

A RULE had been obtained in Michaelmas Term, 1849, calling upon W. Clifford Shirreff to shew cause why an order of *Wightman*, J., dated the 5th of June in the same year, should not be rescinded, and why the Master of the Court should not review his taxation of a bill of costs of Toby, an attorney; and why Shirreff should not refund certain sums of money that had been levied, or so much thereof as the Master had found to have been overpaid.

The following facts appeared upon the affidavits in support of the rule. A person of the name of Shirreff had employed one John Toby as his attorney, to commence

and carry on an action in the County Court, in which the plaintiff obtained a judgment for 5*l.* and costs. Toby delivered a bill of costs “in and about the said action” which amounted to 22*l.* 5*s.* 11*d.*, after giving credit for 11*l.* 8*s.* 7*d.*, the damages and costs received from the defendant. (a) Shirreff paid the bill under the threat of an action; but having subsequently made an ineffectual application to him for a return of part of the sum so paid, on the ground that Toby was not entitled to certain charges which he had made in the action in the County Court, had obtained an order for the taxation of the bill of costs. The following is a copy of the Master’s allocatur:—

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| | £ | s. | d. |
|---|----|----|-------------|
| Amount of Mr. Toby’s bill | - | - | - 22 5 11 |
| Deduct by taxation | - | - | - 13 17 2 |
| | | | <hr/> 8 8 9 |
| Deduct costs of taxation, more than one-sixth having been taken off | - | - | - 6 1 4 |
| | | | <hr/> 2 7 5 |
| Amount due from Mr. Toby to Mr. Shirreff on cash account | 22 | 5 | 11 |
| Amount to be refunded by Mr. Toby to Mr. Shirreff | - | 19 | 18 6 |
| | | | <hr/> |

This sum had been refunded under protest.

C. H. Scotland shewed cause.

Atherton, in support of the rule.

The 9 & 10 Vict. c. 95, s. 91; *Ex parte Green, in re*

(a) The affidavits did not shew what were the items in Mr. Toby’s bill of costs. Whether for charges incurred prior to the commencement of the suit, (see *Keighley v. Goodman, ante*, p. 204), or between that time and “the appearing or acting” in the County Court; or since those periods.

They only stated that he was employed by Shirreff as his attorney to commence and carry on an action in the County Court; that he did so; and delivered a bill of costs of his charges, &c., “in and about the said action,” amounting to 22*l.* 5*s.* 11*d.*

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Clipperton (a), and *Keighley v. Goodman* (b), were referred to.

Lord CAMPBELL, C. J., now delivered the judgment of the Court.—This was an application to rescind a Judge's order for the taxation of the bill of costs of Mr. Toby, an attorney, for business done in a suit in a County Court; to refer the bill to the Master to review his taxation; and to direct the client to repay what had been refunded to him under the Master's allocatur.

The question was, as to the amount of costs to which an attorney was entitled in respect of a suit in the County Court. It appears that Mr. Toby, an attorney of this Court, had been retained by a Mr. Shirreff to conduct a suit for him in one of the County Courts established under the 9 & 10 Vict. c. 95, and that in the result Mr. Shirreff recovered the sum of 11*l.* 8*s.* 7*d.* for the debt and costs in the action; which sum was paid by the defendant to Mr. Toby, as the plaintiff's attorney. Mr. Toby sent in a bill of costs to his client, in which, after giving him credit for 11*l.* 8*s.* 7*d.*, the debt and costs recovered from the defendant, there remained the sum of 10*l.* 17*s.* 4*d.* due to Mr. Toby, which the client paid to him under the apprehension, as he says, of being sued for the amount.

Upon the application to tax, and before the Master, Mr. Shirreff, the client, relied on the decision of this Court in *Ex parte Green* (a), in which it was held that, under the 91st section of the County Courts' Act, an attorney was restrained from recovering more than 15*s.* for his services in a suit in one of those Courts. A similar question subsequently arose in the Court of Common Pleas (b), and, after consideration, that Court came to the conclusion that the restraining clause of the act applies only to appearing and acting as an attorney in Court, and not to his services out of Court and for advising and getting up the case.

(a) Q. B., Trin. Vac. 1848, cited from 12 Jur. 1044.

(b) *Ante*, p. 204.

The 91st section is not very clearly worded : the object of the act was to enable parties to carry on suits for amounts not exceeding 20*l.* at comparatively small expense ; but as the words of the section are certainly capable of the construction put upon them by the Court of Common Pleas, and hardship may in some cases arise from the narrower construction adopted by this Court in the case of *Ex parte Green*, we feel disposed, on consideration, to adopt the same conclusion ; more especially as it is most important that the practice should be uniform. We therefore think that the rule should be absolute, not for rescinding the order of the Judge, but for a review of the taxation and for repayment to Mr. Toby of any sum he may have been obliged to pay to Mr. Shirreff beyond what, on a review of the taxation, the Master finds ought to have been paid.

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Rule accordingly.

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May 31.

[In the Exchequer of Pleas.

Coram *Pollock, C. B., Alderson, B., Rolfe, B., and Platt, B.*]

TRESPASS for breaking and entering a dwelling-house of the plaintiff and seizing and taking away goods and chattels.

Plea, justifying under a *fi. fa.* against the plaintiff's goods indorsed to levy 149*l.*, issued upon a judgment recovered by the defendant, Farmer, against the plaintiff for 146*l.* in the Common Pleas.

A Judge's order given by consent by a trader not afterwards becoming bankrupt, is valid as against him, although not filed in pursuance of the 12 & 13 Vict. c. 106, s. 137.

Semble, that that section makes the Judge's order "null and void" only in the event of the trader becoming bankrupt ; but even then, not as against him.

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Replication,—after stating that the plaintiff was a trader within the meaning of the Bankrupt Law Consolidation Act, 1849,—that a Judge's order was made in the said action, by which it was ordered, by consent, that upon payment of 146*l.* with interest and costs by certain instalments, all further proceedings should be stayed, and in case of default in the payment of any of the instalments, the defendant, Farmer, should be at liberty to sign final judgment and issue execution, &c.; that the said judgment was afterwards signed in pursuance of the said Judge's order, and was not founded upon or authorized by any other order or proceeding whatever; "that the said Judge's order," &c., "was and is a Judge's order made by consent, and given after the commencement of the Bankrupt Law Consolidation Act, 1849, by the plaintiff, so being such trader as aforesaid and whilst he, the plaintiff, was such trader as aforesaid, in a personal action in which he, the now plaintiff, was defendant, and whereby the said now defendant, W. Farmer, the plaintiff in such action, was authorized, at some future time after the making of the said order, to sign judgment and issue execution in such action according to and within the meaning of the Bankrupt Law Consolidation Act, 1849, aforesaid, and that the said action in which the said order was so made was and is in the Court of Common Pleas; that no true or any copy whatsoever of the said Judge's order, together with an affidavit of the time of such consent being given as aforesaid, and a description of the residence and occupation of the now plaintiff, so being the defendant in such action as aforesaid, was filed with the officer acting as clerk of the docquets and judgments in the Queen's Bench, at any time within twenty-one days next after the making of the said order, in like manner as a warrant of attorney in any personal action, and a cognovit actionem given by any defendant in any personal action, or copies thereof, and affidavits of the execution thereof respectively, might or could be filed with the said clerk within the space of twenty-one days

after such warrant of attorney or cognovit actionem should have been executed, or in any other manner, or at any other time whatever, either before or since the signing of the said judgment and issuing the said execution thereon, as by the statute in such cases made and provided is required; whereby, and by reason of the several premises aforesaid, the said Judge's order, the said judgment so entered up thereon, and the said execution so issued on such judgment as aforesaid, were and are respectively null and void to all intents and purposes whatsoever." Verification.

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Special demurrer and joinder.

Martin (*Brett* with him), in support of the demurrer. The question is, whether, if a Judge's order to enter up judgment given by a trader subject to the Bankrupt Laws be not filed, the order and the judgment signed upon it, together with the execution, are void, under 12 & 13 Vict. c. 106, s. 137, even though the trader do not afterwards become bankrupt. The plaintiff must contend that the effect of that section is to make the order void, not only against the assignees, or those who claim under them in the event of a subsequent bankruptcy, but against all the world. In order to ascertain the intention of the Legislature in the new act, the earlier enactments as to warrants of attorney must be referred to. By 3 Geo. 4, c. 39, s. 1, the holder of a warrant of attorney to confess judgment is enabled to file it; and the 2nd section provides, that if after the expiration of twenty-one days after the execution of the warrant of attorney the person giving it should become bankrupt, then, unless the warrant, or a copy thereof, should have been filed within twenty-one days from its execution, or unless judgment should have been signed or execution issued on it within the same period, such warrant of attorney, and the judgment and execution, should be "deemed fraudulent and void against the assignees under such commission, and such assignees shall be entitled to recover

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back and receive, for the use of the creditors of such bankrupt at large, all and every the monies levied or effects seized under and by virtue of such judgment and execution." The 6 & 7 Vict. c. 66, requires that an index book shall be kept in addition to the book required by the former act. The 137th section of the 12 & 13 Vict. c. 106, enacts, that "every Judge's order made by consent given" "by any such trader defendant in any personal action, and whereby the plaintiff" "shall be authorized" "to sign or enter up judgment, or to issue or take out execution in such action," "in case the action in which such order shall be made shall be in the Court of Queen's Bench, or in case the action wherein the same is made shall be in any other Court, a true copy of such order shall, together with an affidavit of the time of such consent being given, and a description of the residence and occupation of the defendant, be filed with the officer acting as clerk of the docquets and judgments in the said Court of Queen's Bench within twenty-one days after the making of such order, in like manner as a warrant of attorney in any personal action," &c., "or copies thereof and affidavits of the execution thereof respectively, may be filed with the said clerk within the space of twenty-one days after such warrant of attorney," &c., "shall have been executed; otherwise such Judge's order, and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be null and void to all intents and purposes whatever." The section then goes on to enact, that the two former acts, 3 Geo. 4, c. 39, and 6 & 7 Vict. c. 66, shall apply to such Judges' orders. The simple question is, whether the words "null and void to all intents and purposes" mean, as in the former act, null and void only against creditors in the event of the trader subsequently becoming bankrupt, or whether they mean null and void as against all the world. The former, it is submitted, is the true construction. The provision, it is to be observed, is found in an act relating solely to bankrupts, and in that

portion of the act which relates "to transactions with the bankrupt, and executions against his property, up to the time of the bankruptcy, or within a limited time previously thereto;" so that the enactment was clearly intended to be limited to proceedings in bankruptcy, and to protect only the creditors of a trader who afterwards became bankrupt, and not others. This is further proved by the provisions of the former acts on the subject being extended to this; shewing that they were passed with the same intention. The object of all the Bankrupt Laws has been to procure an equitable distribution of the bankrupt's estate and effects under the bankruptcy, and not to assist the rest of the world. This statute must be viewed in the same light; and looking at its provisions together with the previous acts, the construction for which the plaintiff must contend cannot be correct, and the replication is bad.

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Gray, in support of the replication. The judgment signed under the warrant of attorney was void, by reason of the Judge's order not having been filed pursuant to sect. 137 of the 12 & 13 Vict. c. 106. The Legislature had, by the 3 Geo. 4, c. 39, directed that a warrant of attorney not filed according to the provisions of that act should be void "against the assignees;" and having those words before them in framing the new act, they do not adopt them, but use the much more general words "null and void to all intents and purposes whatever." These, therefore, have some effect different from the words used in the former statute. The words "such trader" must mean a trader liable to the Bankrupt Act, and not, as contended on the other side, a trader who afterwards becomes bankrupt. The word is used in other parts of the act as synonymous with a person subject to the Bankrupt Laws. Sect. 65 declares what traders may be bankrupts; and sect. 67 speaks of "any trader, liable to become bankrupt, shall depart this realm," &c. In sects. 75, 81, 82, 83, 84, 85, 86, 90, and 93, the word "trader" clearly means person

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“liable” “to become bankrupt.” In other sections, where a different meaning is intended, the word used is not trader but “person,” as in sect. 97; and where a subsequent bankruptcy is contemplated by the act, the word “bankrupt” is used. Thus, in sect. 133, “all payments really and bonâ fide made by any bankrupt,” &c.; and so in sects. 134 and 135. In sects. 136 and 137, the word is suddenly changed to “trader.” [*Alderson, B.*—By sect. 137 the provisions of the former act, 3 Geo. 4, c. 39, are extended to the Judge’s orders mentioned in that section; so that they are not only void, but fraudulent. But how can an order given by the defendant’s own consent be said to be fraudulent against him? According to your construction, any trader may afterwards set aside his own acts as fraudulent. By adding, after “such trader defendant,” the words “afterwards becoming bankrupt,” the whole act is made sensible and intelligible. *Pollock, C. B.*—The preamble of the 20th head is, “with respect to transactions with the bankrupt;” that must be read with the other provisions.] The Legislature has chosen to use more general words in the new act than in the former one; and the Court ought not to confine their effect. It is for the benefit of the world at large that they should have notice whether the trader is incurring any liabilities. It is within the spirit of the Bankrupt Laws to prevent a trader getting false credit, and to take care that his estate may be fairly divided; but if this provision is to be operative only when a man afterwards becomes bankrupt, the object of the act will be defeated. The words in the preamble are satisfied by applying them to sects. 133 and 134, and need not be extended further.

POLLOCK, C. B.—The question raised on this record is, whether under the act 12 & 13 Vict. c. 106, s. 137, where a person, who is a trader, has consented to a Judge’s order to enter up judgment, but the order has not been filed, as required by that section, and judgment has been entered up

thereon and execution had, the trader, without any reference to an act of bankruptcy, may turn round and say, "though I consented to the order which gave you leave to enter up judgment and issue execution, I shall now treat you as a trespasser." The difficulty of coming to such a conclusion is great, and is much increased by what my Brother *Alderson* pointed out in the course of the argument, viz.: that if we hold the judgment to be void, we must also hold it to be fraudulent within the 3 Geo. 4, c. 39; as the same section (137), which makes it void, also makes that act applicable to it. To hold this would be so absurd that if we are not bound by the positive words of the Legislature we cannot come to such a conclusion. The question, as put by the other side, is, how we are to construe this statute; and whether the preamble, which is a part of the statute, and heads that portion of it which is contained from sections 133 to 138, inclusive, is to be incorporated with it. I think it must be read in conjunction with each section; and by so reading it there is no difficulty in deciding this question. The preamble is, "with respect to transactions with the *bankrupt*, and executions against his property, up to the time of the bankruptcy;" and reading section 137 in conjunction with this preamble, the word "trader" will not mean any trader whatever, but any trader who becomes bankrupt. To read it without the preamble, would not be to read it as we are bound to do. It was suggested in argument, that the words "null and void," might not make the judgment null and void as against the person giving it; but I do not found my judgment on that ground, but on the construction of the statute, under which I think the judgment is not null and void within the terms of the act, the trader not having become bankrupt.

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ALDERSON, B.—I am of the same opinion. If we look into the act of Parliament, we need not arrive at the grievous absurdity of enabling a man to set aside as void his own deliberate act. Looking to the act we find the

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provision embodied in that part which relates to bankrupts; and each section must be read with the light of the preamble reflected upon all within its ambit.

ROLFE, B.—I am of the same opinion. I think the true method of construction requires us to read the section together with the preamble. It is plain that this is necessary in a merely grammatical point of view; for the preamble ends with “be it enacted,” and the different sections make various enactments. But those words are not continued throughout; and though it is true they are to be found at the commencement of the section now under consideration, and also at the commencement of sections 136 and 138, they are not in sections 133, 134, and 135, which would not be complete without the preamble. Independently however of that ground, I should say on authority as well as on principle, that it is our duty to confine the enactment to creditors under a bankruptcy only, and not to those claiming under the acts of the party. The statute 1 Eliz. c. 19, s. 5, enacted, that certain ecclesiastical leases should be void; but the Courts have always held such leases good against the lessor. The preamble of the 3 Geo. 4, c. 39, recites, that “injustice is frequently done to creditors by secret warrants of attorney to confess judgments for securing the payment of money; whereby persons in a state of insolvency are enabled to keep up the appearance of being in good circumstances, and the persons holding such warrants of attorney have the power of taking the property of such insolvents in execution at any time, to the exclusion of the rest of their creditors;” then the act goes on to enact, in section 3, that if the warrant of attorney is not filed within twenty-one days after execution, and a commission of bankruptcy issues against the party who gave it, and he is declared bankrupt, the warrant of attorney, judgment, and execution, “shall be deemed fraudulent and void against the assignees.” And by sect. 4, if the warrant of attorney is given, subject to a condition or defeasance, it must be

written on the same paper as the warrant of attorney, before it is filed, otherwise the warrant of attorney “shall be null and void to all intents and purposes.” In *Morris v. Mellin* (a), in which the question arose whether the latter section applied to all cases, the majority of the Court held, that the 4th section was to be confined to the protection of creditors under a commission of bankruptcy, and that it applied only to such warrants of attorney as fall within the former sections of the act. *Holroyd, J.*, dissented from that view, and I own I think with great appearance of reason; inasmuch as the words used in the two sections are different,—those in sect. 2 being, “void against the assignees,” and those in sect. 4, “void to all intents and purposes.” The same question arose again in *Bennett v. Daniel* (b), where the majority of the Court consisting of the same Judges, adhered to their former opinion; my Brother *Parke*, however, who was then in that Court, and had taken the place of *Holroyd, J.*, dissented; but expressly said he should have agreed with the rest of the Court, if an intention different from the ordinary sense of the words could be collected from other parts of the act. There, although the words are in the one section limited, and in the other general, it was held, that the words in the 4th section must be cut down by what went before. At all events, even if we did not adopt the construction referred to, we ought still to hold that the enactment does not apply to the present case.

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PLATT, B.—The question we have to decide is, whether the replication is good, that is, whether a man who by his own deliberate act has consented to a Judge’s order to enter up judgment, may defeat it. The object of all the Bankrupt Acts is to procure an equitable distribution of the bankrupt’s effects. The late act has made various alterations in the proceedings, but it still relates only to bankrupts. This

(a) 6 B. & C. 446; S. C. 9 D. & R. 503. (b) 10 B. & C. 500.

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appears without adverting to the title, which is no part of the act, for the preamble runs, "whereas it is expedient to amend and consolidate the laws relating to bankrupts." It does not say "traders," but "bankrupts." Then the act is divided into different heads, and the preamble of those heads must be referred to in order to explain the clauses which follow. Bankruptcy is clearly contemplated in the preamble which governs sect. 137; but if this were not so, I agree with my Brother *Rolfe*, that the intention of the act is to distribute the effects, and to protect the creditors of a bankrupt, and not to assist others, or to enable a trader to set aside a warrant of attorney or Judge's order given by himself. Warrants of attorney have always been watched with great jealousy by the Legislature, with the view of protecting, not the persons who give them, or those to whom they are given, but other creditors; and to secure an equal distribution among them.

Judgment for the Defendants.

May 23.

GRAHAM v. CONNELL.

[In the Exchequer of Pleas.

Coram *Pollock*, C. B., *Alderson*, B., *Rolfe*, B., and
Platt, B.]

The Court has no jurisdiction to rescind the order of a Judge at Chambers charging stock or shares under 1 & 2 Vict. c. 110, s. 14 (a).

IN this case a rule had been obtained last Term, calling on the plaintiff to shew cause why two orders made in this cause by *Talfourd*, J., and *Alderson*, B., respectively, should not be rescinded.

The first order, dated the 13th of April, ordered, that unless the defendant shewed cause within a week, his shares in a joint stock company, called the Union Bank of London, should stand charged with 5,962*l.* 4*s.* 3*d.*; and the second

(a) See, however, *Robinson v. Burbidge*, ante p. 94, 8.

enlarged the time of shewing cause for a month, in order to enable the defendant to apply to the Court to rescind the first order.

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Upon *Willes* appearing to shew cause,

POLLOCK, C. B.—The Court has no power to interfere in this case. It has not an universal authority over orders made by Judges at Chambers. In *Witham v. Lynch* (a), this Court refused to interfere to rescind a similar order to the present.

Willes referred to *Brown v. Bamford* (b); *Fowler v. Churchill* (c); *Morris v. Manesty* (d).

ALDERSON, B.—The appeal from a Judge at Chambers, lies only when his decision relates to the business of the Court. Where, as here, it has no relation to such business, but is collateral, there is no appeal to the Court, unless it be expressly given by act of Parliament. The case, however, may be heard before me; and my Brother *Parke* will sit with me to assist me.

Martin and *G. R. Clarke* were in support of the rule.

The case stood over accordingly, and was subsequently (June 11) heard before *Alderson*, B., *Parke*, B., assisting, when the rule was discharged (e).

Rule discharged.

(a) 1 Exch. 391.

(b) 9 M. & W. 42; S. C. 1 Dowl. 361, N. S.

(c) 11 M. & W. 57; S. C. 2 Dowl. 767, N. S.

(d) 7 Q. B. 674.

(e) The question chiefly discussed was, whether the shares, which were transferable only with

the consent of the directors, were “shares” in a “public company,” within the meaning of the 1 & 2 Vict. c. 110, s. 14. Their Lordships, however, abstained from expressing any opinion on this point, leaving the validity of the order to be determined by the Court of Chancery.

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June 1.

In re a Plaintiff, &c., in the County Court of SURREY,

Between

STILL

and

BOOTH.

[*Bail Court. Coram Wightman J.*]

Where a writ of prohibition was issued out of the Petty Bag Office of the Court of Chancery in Vacation, upon an ex parte affidavit, without leave of the Court or a Judge, and disclosed no sufficient ground of prohibition on the face of it, this Court set it aside on motion, under the 12 & 13 Vict. c. 109, s. 39.

After recovery of judgment for a debt against a defendant in a County Court, he petitioned for and obtained his discharge under the Insolvent Act, and inserted the debt in

A RULE had been obtained in last Easter Term (May 8), calling on the defendant to shew cause why the writ of prohibition issued from the Petty Bag Office of the Court of Chancery, bearing date the 26th of last February, to prohibit the Judge of the County Court of Surrey, the clerk, high bailiff, and other officers of the said County Court, from proceeding or carrying into execution, or in anywise giving effect to or proceeding upon the judgment between the above named parties, should not be quashed.

The following facts appeared upon the affidavits. On the 15th of May, 1849, a judgment was obtained in the above plaintiff, in the County Court of Surrey, for the recovery of debt and costs by instalments. Before any instalment became due, the defendant, having been arrested at the suit of a third party, petitioned the Court of Insolvent Debtors, under the 1 & 2 Vict. c. 110, for his discharge; and a vesting order was made accordingly. On the 11th of June, and after the first instalment had become due, he filed a schedule of his debts, in which he included the debt and costs due in this action. On the 4th of July, the petition came on to be heard at the

his schedule. On a judgment summons before the County Court, under the 9 & 10 Vict. c. 95, s. 60, he pleaded his discharge; but the County Court Judge, notwithstanding, made an order for payment of the debt by instalments, and afterwards, on default, for his committal to prison: *Held*, that although the defendant, who had been imprisoned, might be entitled to his discharge, it was at most an error in the exercise of his powers on the part of the County Court Judge, and not an excess of jurisdiction, and that, therefore, prohibition would not lie.

Insolvent Court, and Still opposed him in respect of the debt and costs recovered in the above plaint. The hearing was adjourned to the 28th of July, when an order of adjudication was made, entitling him to his discharge at the date of six months from the date of the vesting order, which term expired on the 29th of November, 1849.

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On the 19th of February, 1850, the defendant, having been served with a summons founded on the judgment in the County Court, attended before the Judge of that Court, and objected that he was discharged from the above debt by the order of the Insolvent Court. The Judge, notwithstanding, made an order on him to pay the balance remaining due by instalments. On an affidavit of these facts, filed in the Petty Bag Office of the Court of Chancery, the defendant obtained the present writ of prohibition. A copy of the writ was annexed to the affidavit, and disclosed no ground for prohibition (*a*).

The writ was served on the Judge of the County Court, who, notwithstanding, made an order, founded on the above

(*a*) The writ was in the following form :

"Victoria, by the grace of God," &c. "To the Judge of the Southwark County Court of Surrey, greeting. Whereas by the common *counsel* (*b*) of England it is provided, that it is not lawful for any one in England but for us and our ministers having special authority so to do, to attach any person going through their bailiwick, or power, to answer another upon any contracts, covenants, or trespasses, done without the same bailiwick or power : We, therefore, do prohibit you, the said Judge of the said County Court, and also you the clerk, high bailiff, and other the officers of the said County Court, and each and every of you, from proceeding or carrying into execution, or in anywise giving effect to or proceeding upon the judgment wherein William Grimwood Still is the plaintiff, and Robert Booth the defendant, and therein fail not at your peril. Witness ourself at Westminster, the twenty-sixth day of February, in the thirteenth year of our reign.

"LANGDALE,
"ABBOTT."



[*Chancery Common Law Seal,*
Petty Bag.]

(*b*) *Sic.*

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judgment, for the committal of the defendant for the period of one month to Horsemonger Lane Gaol. The defendant remained in custody under the warrant of commitment till the 3rd of March, when he was discharged out of custody by an order of *Coleridge*, J., at Chambers. An action had been since commenced against the County Court Judge for disobedience of the writ of prohibition.

Skinner shewed cause. This writ is issued on an affidavit filed in the Petty Bag Office of the Court of Chancery; and that affidavit states sufficient grounds for granting the writ; *Ex parte Pardy* (a). It is not necessary that the leave of the Court or of a Judge should be first obtained. The writ is granted by the proper officer and in the usual form; and need not shew on the face of it what are the grounds for prohibition which are relied on. The 11 & 12 Vict. c. 94, s. 34, enables the Judges of the Superior Courts at Westminster to dispose of any matters arising in or incident to any action on the common law side of the Court of Chancery; that statute is in some provisions repealed by the 12 & 13 Vict. c. 109; but the same powers are re-enacted by the 39th section; "subject nevertheless and according to the provisions of this act, and the laws, rules, and regulations for the time being in force for the regulation of the said Court" (the Court of Chancery), "and the practice and proceedings thereof." The only rule in Chancery which affects the issuing of such a writ, is to be found in the "General Rules and Orders of the High Court of Chancery on the Common Law Side thereof, as to Proceedings in the Petty Bag Office" (b), and merely requires a fee of ten shillings to be paid on issuing it (c). If, however, the objection be that the writ is irregular merely, that is waived by the lapse of time, the present rule not being obtained till more than two months afterwards.

(a) *Ante*, p. 16.

Lond. 1849.

(b) Published "by authority."

(c) Page 15.

Lush, in support of the rule. A writ of prohibition should disclose, on the face of it, a sufficient ground of prohibition; for the opposite side may put the party suing out the writ to declare in prohibition; and it has been held in several cases that if there be any variance between the ground of prohibition stated on the face of the declaration and that stated on the writ, the prohibition cannot be maintained. And the old proceeding in such cases was, to enter a suggestion of the matter for prohibition on the roll. In no case, till very lately, has it been attempted to issue a writ of this high nature on an ex parte application, and without the leave of the Court or a Judge (a). In the case of *Baddely v. Denton* (b), the Court of Exchequer set aside a writ of prohibition so issued, although the writ disclosed a ground of prohibition on the face of it. But granting that such a writ could properly issue, there was no excess of jurisdiction in point of fact in the present case. It may be that the Judge of the County Court ought not to have made the order under the circumstances; but he clearly had jurisdiction to do so.

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WIGHTMAN, J.—It seems to me that I ought to make this rule absolute on both grounds; first, because it is not shewn that such a writ could properly be issued according to the practice of the Court of Chancery, or of any Court out of which writs of prohibition issue. In the case in the Exchequer, a ground of prohibition was stated on the face of the writ, and yet the Court set the writ aside.

Independently of that, however, it seems to me that the writ issued improvidently, for I do not see that there was, in point of fact, any defect of jurisdiction at all; but at most an erroneous exercise of his powers by the County Court Judge, which would perhaps entitle the defendant to

(a) It was stated that the Lord Chancellor had forbidden the keeper of the Petty Bag Office to issue any more of these writs

upon such materials.

(b) *Exch.*, Mich. Term, 1849. This case will be reported in 7 D. & L.

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be discharged from the imprisonment. I need not, however, refer to this latter point, as my Brother *Coleridge* has already ordered him to be discharged.

It seems to me, therefore, that on either ground the rule must be made absolute.

Rule absolute.

June 1.

BUTTIGEIG v. BOOKER and Others.

[In the Common Pleas.

Coram *Maule, J., Cresswell, J., and Talfourd, J.*]

To a declaration by indorsee against acceptors of two bills, defendants pleaded that the bills were

ASSUMPSIT by indorsee against acceptor of a bill of exchange for 250*l.*, payable sixty days after sight, drawn by certain persons beyond the seas, by and using the name, style, and designation of Macdowall and Sons, and indorsed

accepted by them and B., and not by defendants alone; that at the time when the bills became due they still were in the hands of M. and Sons, the drawers, and continued in their hands till the agreement after mentioned; that on, &c., it was agreed, that in consideration of defendants and B. paying M. and Sons 500*l.* in settlement of certain accounts, M. and Sons should accept a dividend of 2*s.* 9*d.* in the pound on certain acceptances of defendants and B., (including those sued upon), and to deliver up such acceptances within a month, the defendants to pay the composition within a month, or to tender it at O.; and that the party making default in observing the agreement should forfeit 500*l.* That defendants and B. accordingly paid M. and Sons 500*l.*, and were ready to pay the composition, and tendered the same at O. Averment, that M. and Sons would not accept the dividend nor deliver up the acceptances, but afterwards delivered them to the plaintiff, who received them with notice.

Replication, *de injuriâ*.

Held, on special demurrer, that the replication was good.

The defendants pleaded another plea, similar to the above one, except that the agreement was alleged to have been made between plaintiff through M. and Sons, as his agents, and defendants and B.

Replication, that it was not agreed between plaintiff, through M. and Sons as his agents, and defendants, *modo et formâ*.

Held, that although the violation of the agreement by plaintiff made plaintiff liable to pay the penalty of 500*l.*, it was no answer to the present action, and therefore, that the plea was bad.

Whether the replication was not too narrow for traversing the agreement between plaintiff and defendant only, and not between the plaintiff and defendant and B., *quære*.

Whether it was not also bad for duplicity, for putting in issue not only the agreement, but also the agency through which it was alleged to have been effected, *quære* (a).

(a) See *Bennison v. Thelwell*, 7 M. & W. 512; S. C. 9 Dowl. 739. *Bell v. Tuckett*, 3 M. & G. 785; S. C. 4 Scott N. R. 402; 1 Dowl. 458, N. S. *Pigeon v. Osborn*, 12 A. & E. 715; S. C. 4 P. & D. 345; 9 Dowl. 511. *De Bernardy v. Spalding*, 4 Q. B. 823. But see also *Thurman v. Wild*, 11 A. & E. 453; S. C. 3 P. & D. 289. *De Wolf v. Bevan*, 13 M. & W. 160; S. C. 2 D. & L. 345. *Bonzi v. Stewart*, 7 M. & G. 746; S. C. 2 D. & L. 258. *Hammond v. Colls*, 1 C. B. 916; S. C. 3 D. & L. 164. *Jones v. Jones*, 16 M. & W. 699; S. C. 4 D. & L. 494; and *Michael v. Myers*, 6 M. & G. 702.

by them to the plaintiff. The second count was upon a bill for 225*l.*, similarly drawn, accepted, and indorsed; and the declaration contained also counts for money paid and upon an account stated.

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Eighth plea to the first and second counts of the declaration, that the said two bills of exchange in those counts mentioned were accepted by the defendants and one William Lane Booker, and not by the defendants alone; and that at the time the same became due, and before the delivery thereof to the plaintiff as hereinafter mentioned, the said two bills remained, and had been continually from the time of the acceptance thereof up to that time, in the hands of the said Macdowall and Sons for value, and had not been delivered over to the plaintiff by the said M. and Sons, and so continued from the times of their becoming due until the time of making the agreement hereinafter mentioned, to wit, on the 21st day of August, 1848, in the hands of M. and Sons for value. That whilst the said bills were so in the hands of M. and Sons, to wit, on the 21st day of August, 1848, and before the delivery thereof to the plaintiff as hereinafter mentioned, it was agreed between M. and Sons and the defendants and the said William Lane Booker that in consideration of the defendants and W. L. B. paying to the said M. and Sons the sum of 500*l.* sterling in settlement of their (M. and Sons' and the defendants' and W. L. B.'s) differences of account, M. and Sons engaged to accept the defendants and W. L. B.'s dividend of 2*s.* 9*d.* in the pound on the following bills accepted by the defendants and W. L. B., and which M. and Sons bound themselves to deliver to the defendants and W. L. B. accordingly within one calendar month of the date of that agreement, receiving the said dividend on each acceptance as it should be delivered up, that is to say: [the plea then set out a list of bills accepted by the defendants and W. L. B., amounting together to 10,025*l.* 12*s.* 6*d.*, among which were acceptances in favour of the plaintiff for 475*l.*;] it being understood, that the defendants and W. L. B. were to be at liberty to

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pay the said composition on the said acceptances at any time within the period of one calendar month, and to tender the same at the office of Mr. O.; and the said M. and Sons holding the defendants and W. L. B. harmless for any further liability on the said acceptances; but in default of the fulfilment of that agreement within the time specified on either side, the defaulter to be subject to a penalty of 500*l.* sterling, as liquidated damages. That the said agreement being so made as aforesaid, and whilst M. and Sons were such holders of the said bills, to wit, on, &c., the defendants and W. L. B. paid to M. and Sons, and the latter then accepted, the said sum of 500*l.*, in settlement of the said differences of account, according to the said agreement; and that the defendants and W. L. B. were ready and willing, within one calendar month from the making of the said agreement, to pay the said composition on the acceptances in the said agreement mentioned, and did then, and within one calendar month as aforesaid, to wit, on, &c., tender the same at the office of the said Mr. O. That the defendants and W. L. B. have from the time of making the said agreement hitherto been ready and willing to perform and fulfil the said agreement in all things on their parts to be performed and fulfilled, and of all which the said M. and Sons then had notice. Averment, that the said M. and Sons did not, nor would, accept the said dividend of 2*s.* 9*d.* on the acceptances in the said agreement mentioned so tendered as aforesaid according to the said agreement, but then wholly refused so to do, nor did nor would they deliver up the said acceptances to the defendants and the said W. L. B., on the amount of the said dividends on each acceptance being tendered to them as aforesaid, but therein wholly failed and made default. The plea then averred the identity of the bills in the declaration, and those described in the agreement as the acceptances of the defendants and W. L. B. in favour of G. Buttigeig for 475*l.*; and then alleged that after the making of the said agreement, the said

M. and Sons delivered the said bills to the plaintiff in violation of the said agreement, which was the delivery in the first and second counts mentioned, and that the plaintiff received the said bills with notice of the premises, &c. Verification.

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The ninth plea was similar to the eighth, except that it averred that the agreement had been entered with the plaintiff through Macdowall and Sons, as his agents.

Replication to the eighth plea, *de injuriâ*; to the ninth, that it was not agreed by and between the plaintiff by and through the said Macdowall and Sons, as his agents, and the defendants, *modo et formâ*.

Special demurrers and joinder.

Wordsworth, in support of the demurrers. The replication *de injuriâ* cannot be properly pleaded to the eighth plea, for that is in substance a plea of accord and satisfaction. [*Talfourd*, J.—How can that be, if the relation of debtor and creditor never arose between the plaintiff and defendants?] In *Jones v. Senior* (a), *de injuriâ* was held a bad replication to a plea very similar to the present. The plea shews a discharge from an implied promise to pay the plaintiff. [*Cresswell*, J.—It rather shews that the defendant never did promise; that he never was liable to pay the plaintiff.] [*Wordsworth* referred to *Scott v. Chappelow* (b), and 2 *Wms. Saund.* 295 a, n. (d), 6th ed.]

Next, the replication to the ninth plea is bad. First, it is too narrow; for it does not deny that the agreement mentioned in the plea was entered into between the plaintiff and the defendants and Booker, but only denies that it was entered into between the plaintiff and the defendants. Secondly, it is bad for duplicity; for it puts in issue not only the agreement, but also the agency of Macdowall and Sons.

(a) 4 M. & W. 123; S. C. 6
Dowl. 701.

(b) 4 M. & G. 336; S. C. 5
Scott N. R. 148; 2 Dowl. 78, N. S.

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Warren, contra. The accord which the eighth plea sets up is an accord between the drawers and the acceptors of bills; but that is not an accord and satisfaction with the plaintiff; *Mitchell v. Cragg* (a). [He cited also *Tolhurst v. Notley* (b); *Bennett v. Bull* (c); *Herbert v. Sayer* (d), and *Robinson v. Little* (e).]

He also contended that the replication to the ninth plea was good, and that that plea was bad. [*Cresswell*, J., referred to *Lane v. Alexander* (f).]

Wordsworth, in reply.

MAULE, J.—I think that the replication to the eighth plea is good. The declaration states that the defendants accepted certain bills drawn upon them, and that the drawers delivered the bills to the plaintiff, to whom the defendants promised to pay. The eighth plea sets up by way of defence—if it be a defence—a transaction between the defendants and the drawers of the bills, shewing that notwithstanding there was this contract between the plaintiff and the defendants by the drawing, acceptance, and indorsement of the bills, yet that contract, although existing in fact, is not a contract in point of law. Whether such a defence as this is to be treated as a defence by way of excuse, or by way of discharge, or as any other kind of defence to which *de injuriâ* may be properly replied, is a question which has been considered in several cases; as *ex. gr.* in *Humphreys v. O'Connell* (g); *Scott v. Chappelow* (h), and *Bennett v. Bull* (i). The spirit of those cases is this: inasmuch as the defendant is now called upon to plead specially certain matters which he might formerly

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| (a) 10 M. & W. 367; S. C. 2 | L. 246. |
| Dowl. 252, N. S. | (f) Yelv. 122. |
| (b) 11 Q. B. 406. | (g) 7 M. & W. 370; S. C. 9 |
| (c) 1 Exch. 593. | Dowl. 213. |
| (d) 5 Q. B. 965; S. C. 2 D. & | (h) 4 M. & G. 336; S. C. 5 |
| L. 49; 1 D. & M. 723. | Scott N. R. 148; 2 Dowl. 78, N. S. |
| (e) 9 Q. B. 602; S. C. 6 D. & | (i) 1 Exch. 593. |

have set up by the comprehensive plea of non assumpsit, it is reasonable that the plaintiff should be allowed to put all those matters in issue, which he formerly put in issue by his replication to non assumpsit. Fraud, or any other matter making the contract void, is now to be pleaded, not as traversing the contract in the declaration, but as confessing the existence of the contract and avoiding it. Here, the plea admits that there was a contract by the defendants with the plaintiff, but states that the bills were delivered to the plaintiff under certain circumstances; from which it is to be inferred that the contract is not in law binding on them. Whether the contract was operative in point of law, is a question which might formerly have been raised by the negative plea of non assumpsit. It is now necessary to plead a plea shewing that the inference which the law draws from the facts stated in the declaration does not follow; but it was not intended by the new rules that it should follow, from a plea of this kind being required, that the plaintiff should be deprived of the power of putting the defendant on proof of it. I think, therefore, both on the authority of the cases, and upon principle,—a principle which appears to me a very reasonable one,—that this replication is good.

With respect to the replication to the ninth plea, there may be some nicety in deciding whether the objection is not well founded, that it puts in issue both the agreement, and also the fact of its having been made by means of the particular agents mentioned in the plea. The case referred to by my Brother *Cresswell* strongly resembles the present; but it is to be observed, that there the replication did not contain the words “modo et formâ.” The plaintiff in that case alleged that the Queen, at a Manor Court held on such a day, by J. S., her steward, and by copy of Court roll, &c., granted certain land to the plaintiff’s lessor; and the defendant rejoined, traversing that the Queen, at a Manor Court held on such a day, by J. S., her steward,

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granted the land to the lessor; and the Court held that the traverse was ill. Mr. *Stephen* says (*a*), “the traverse, it seems, ought to have been, that the Queen did not grant *in manner and form as alleged*,” by which I understand him to mean, not that the addition of the words “modo et formâ” would have made the replication good, but that the traverse ought to have been simply of the demise “modo et formâ.”

It is not, however, necessary to decide this point, because I think the ninth plea is bad. It sets up an agreement between the plaintiff and the defendants, that the plaintiff would not sue upon these and certain other bills, but would accept 2*s.* 9*d.* in the pound on them; or that if he did not choose to abide by that agreement he should pay 500*l.* He has violated his agreement, and he may therefore be compelled to pay the 500*l.*; but this affords no substantial defence to the present action. The plaintiff may sue upon the bills quite consistently with the agreement stated in the plea. Our judgment must therefore be for the plaintiff.

CRESSWELL, J., and TALFOURD, J., concurred.

Judgment for the Plaintiff.

(*a*) *Stephen on Pleading*, p. 280, 5th ed.



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ASHLEY v. BROWN.

June 3.

[*Bail Court. Coram Wightman, J.*]

A RULE had been obtained in Easter Term last, calling upon the plaintiff to shew cause why all proceedings taken in this cause since the 8th of October last, should not be set aside; and why the defendant should not be discharged out of the custody of the sheriffs of London as to this action.

The following facts appeared upon the affidavit of the defendant on which this rule was obtained. The above action having been commenced against him in June, 1849, he instructed one Walter, an attorney, to defend it. Walter delivered a plea in the action; and soon after, on the 9th of July, died. From the time of his death the defendant never heard of any proceedings having been taken in the cause until he was arrested upon a ca. sa. issued in this action. The defendant stated his belief that no notice of trial had been given. There was also an affidavit by the present attorney of the defendant, that final judgment on a postea was signed in this cause on the 9th of November last for 45*l.* debt, and 28*l.* 4*s.* costs.

The plaintiff's affidavit in answer shewed the following facts. The issue and notice of trial in the above action were delivered during the lifetime of Walter, at his office, on the 10th of August last. The cause was tried on the 3rd of November, and the plaintiff recovered a verdict for the whole amount of the debt and 1*s.* damages, and 40*s.* costs. On the 8th of November, he left a bill of costs, and notice to tax, at Walter's office. The costs were taxed and final judgment signed, and a writ of fi. fa. issued, which was placed in the hands of the sheriff of Middlesex for

After notice of trial given, the defendant's attorney died, and the plaintiff, not being aware of the fact, went to trial, and obtained a verdict and judgment, and sued out execution, under which the defendant was detained in custody. The Court refused to set aside the proceedings, or to discharge the defendant out of custody; as it did not appear but that the defendant knew of the attorney's death at the time it occurred, and had withheld that knowledge from the plaintiff.

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execution. In the month of December, the sheriff seized the defendant's estate and interest under an agreement for a lease of a house, which was sold on the 12th of July in the present year. On the 20th of March, a testatum *capias ad satisfaciendum* was issued and lodged with the sheriffs of London, in whose custody the defendant was. The plaintiff swore that he "was not aware of the said Charles Walter being dead until on or about the 25th of March last, when an application was made by the defendant to one of the Judges of this Court to set aside the judgment, which was refused."

Ogle shewed cause. The plaintiff's proceedings are perfectly regular, and there is no ground for setting them aside. He shews by his affidavit that he did not know of the death of the defendant's attorney till the 25th of March last, and the defendant does not shew but that he knew of it at the time it occurred. It was the defendant's duty to attend at the trial, or to give the plaintiff notice, that he required the trial to be postponed. He cannot now come to set it aside.

Joyce, in support of the rule. The rule does not seek to set aside the notice of trial, which is regular, but only the trial itself. The record when made up must state an appearance at the trial either by the defendant in person, or by attorney. As the defendant's attorney died before the trial, a fresh notice of trial became necessary. [*Wightman, J.*—What authority is there for that?] At any rate, the notice to tax should have been served upon the defendant. It must have been served wrongly, if at all. [*Master Bunce.* It is no ground for setting aside a judgment that no notice of taxation is given, but only for referring the taxation back to the Master.] There are several cases to shew that any steps taken after the death of the defendant's attorney are void. [*Wightman, J.*—

That depends upon whether it is a step to bring the defendant into Court.] In *Bradley v. Breach* (a) it is said, "if an attorney dieth, the plaintiff or defendant must be required to make a new attorney, unless any doth undertake the suit as attorney voluntarily for the plaintiff or defendant." [*Wightman, J.*—When did the defendant know of the death of his attorney?] That is not stated. [*Wightman, J.*—I must take it then that he knew of it at the time when it occurred. Ought he not to have given notice of it to the plaintiff, without suffering him to go on and incur expense in what he now terms an useless proceeding?] None of the books of practice lay down any such rule.

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WIGHTMAN, J.—I think this rule must be discharged. It would be hard upon a plaintiff if his proceedings were to be set aside as irregular, because, unknown to him, the defendant's attorney happened to die, and the defendant, who did know of it, did not choose to acquaint him with the fact. If no notice of trial had been given in this case before the death of the attorney, perhaps the defendant might have been entitled to his rule.

Rule discharged.

(a) 2 Keble, 275.



June 4.

CRISP v. ATTWELL.

[*Bail Court. Coram Wightman, J.*]

Where there are issues in law and issues in fact, the time within which the plaintiff must proceed to trial runs from the decision of the former.

HENNIKER moved for judgment as in case of a nonsuit.

In this case there were issues in fact and issues in law. The issues in fact were joined on the 5th of April, 1849; the issues in law were heard on the 6th of February, 1850, and judgment was given for the defendant. The cause was a town cause.

Henniker. The question is, whether the time from which the plaintiff is bound to go to trial, dates from the decision of the issues of law. It is so laid down in 2 *Chit. Archb.* 1299, 8th ed.; but the only case (a) cited as an authority for it does not bear out the proposition advanced.

WIGHTMAN, J.—The plaintiff is not bound to go to trial on the issues of fact till the issues of law are determined. The default can only be reckoned from the latter date. I think the motion is premature.

Rule refused.

(a) *Duberley v. Page*, 2 T. R. 391, 4.

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June 5.

In re an Arbitration
Between JOHN BURNAND
and
JOHN WAINWRIGHT.

[*Bail Court. Coram Wightman, J.*]

A RULE had been obtained in last Easter Term, calling upon John Burnand to shew cause why the award made in this matter should not be remitted to the re-consideration of the arbitrators, or two of them, on the ground that the award was made by the said arbitrators under an erroneous apprehension of facts.

The affidavits in support of the rule shewed the following facts. In October, 1849, Burnand commenced an action against Wainwright on a money demand; and in January, 1850, Wainwright brought a cross action, for salary as a commission agent, against Burnand. By an agreement, dated the 28th of February, 1850, "all matters in dispute between them in respect of which the aforesaid actions were respectively commenced," were referred to the award of three arbitrators named, or any two of them; "the costs and charges of the said two actions," and "of the reference and award," "to be in the discretion of the said arbitrators." There was a clause enabling the Court to remit the matters back to the arbitrators for re-consideration. The arbitrators made their award on the 19th of March, 1850, and found that Burnand had a good cause of action against Wainwright, and that the latter should pay Burnand the sum of 208*l.* 11*s.*; but that Wainwright had no cause of action against Burnand. It appeared that Wainwright's claim in the action against Burnand, whose sister had married Wainwright, was for the amount of certain arrears of salary, which he alleged to be due to him as the agent of Burnand, and which he had claimed before the arbitrators, but which claim Burnand had denied. Wainwright's affidavit

Where fresh evidence was discovered since the making of an award, which must have been known to, but withheld by, the party in whose favour the award was made, the Court ordered the matter to be remitted to the arbitrator for re-consideration, under a clause to that effect in the agreement of reference.

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in support of the rule stated, that for some time past the deponent and his wife lived unhappily together, and that since the award his wife had left his house. That since she so left, deponent found amongst her papers a letter in the handwriting of the said John Burnand, and addressed to her; and which letter he had never seen or heard of before, and which was in the following terms:—"To my sister Anna Wainwright. I have this day engaged your husband, John Wainwright, to be my shipping agent, for which service I have promised to give him 100*l.* per annum. This is to certify, that in the event of anything unforeseen happening, you are hereby empowered to receive the same. Given under my hand this 22nd of August, 1845. JOHN BURNAND." The arbitrators also made an affidavit that they did not allow John Wainwright his claim of 100*l.* per annum for salary, but a smaller sum; and they stated that if they had had any declaration under the hand of the said John Burnand to the effect above mentioned, it would have materially affected their decision as to the balance really due between the parties. They also stated that they were willing to enter again upon the consideration of the case.

Burnand's affidavit in answer stated, that he was a merchant carrying on business in Mexico, and that he had employed Wainwright as his shipping agent at Liverpool, to be paid by the usual commission charges on the goods shipped. That on his return to England in May, 1849, he applied to Wainwright to pay over certain sums which the latter had received on his account, and on his not doing so, had commenced the above action against him. That Wainwright, just after the said application, had sent in an account in which, for the first time, deponent found that he claimed a salary of 100*l.* per annum. He denied in the most explicit terms, that he had ever, either verbally or otherwise, agreed to pay such a salary, or any other salary, to Wainwright. He averred that the letter in question was a forgery, and was not in his handwriting, although a close imitation thereof, and was not written by his authority, knowledge, or consent; and that he was entirely ignorant by whom

such letter was written, or how it came among the papers of Wainwright's wife. There was also an affidavit by Burnand's attorney, stating that he was well acquainted with Burnand's handwriting, and that he believed the letter in question to be a forgery.

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Phipson now shewed cause. In no case have the Courts of common law remitted awards back to the arbitrators for re-consideration, on the ground that fresh evidence has been discovered. A Court of equity might perhaps exercise this power, upon the ground of surprise and fraud (*a*); but not merely because further evidence has been procured. Here, however, it appears that there is a full answer to this application on the merits. Burnand swears positively that the document is a forgery, and that he never wrote any such letter or authorized any one to write it; and that he never engaged Wainwright at that salary or any other, but only on commission.

T. Jones, in support of the rule. The question whether or not this letter is a forgery, is a proper one to be remitted to the arbitrators, under the clause in the agreement of reference to that effect, and need not be now discussed. If this letter is genuine, Burnand must have been aware that he had written it, and then his conduct in suppressing it would amount to that species of fraud which would justify the Court in remitting the matter to the arbitrator.

WIGHTMAN, J.—I think it is reasonable that as this letter has been discovered since the hearing before the arbitrators, the award should be remitted back to them to inquire whether the letter is or is not in the handwriting of Burnand; and if they find that it is, then to re-consider the matters in difference.

Rule accordingly (*b*).

(*a*) See *Southsea Co. v. Bumstead*, 2 Eq. Ca. Abr. 80; *Mitchell v. Harris*, 2 Ves. Jun. 129, 136; and *Russell on Awards*, p. 635, 6.

(*b*) The rule, as drawn up, pro-

vided, that if the arbitrators found the letter a forgery, a Judge at Chambers was to have power to order the payment of the sum awarded, and the costs.

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PHILLIPS and Another v. SURRIDGE.

[In the Common Pleas.

Coram *Wilde, C. J., Maule, J., Cresswell, J., and
Talfourd, J.*]

A plea in bar of the further maintenance of an action of assumpsit, averred that the defendant was a trader

ASSUMPSIT by drawers against acceptor of a bill of exchange for 45*l.* 16*s.* 2*d.* The declaration contained also counts for goods sold and delivered, work and labour, and upon an account stated.

within the Bankrupt Act of 1849; that he was at the time of making the deed after mentioned, indebted to the parties of the second part of that deed, and to divers other persons, in divers sums, and was and would be unable to pay them in full; that before the making of the said deed, to wit, after the coming into operation of the Bankrupt Act, to wit, on the 25th of October, 1849, as such trader made (*sic*) after the coming into operation of the Bankrupt Act, to wit, on the 7th of November in the year aforesaid, which said indenture bearing date, &c., to wit, the day and year aforesaid (*profert*), and made between the defendant of the first part, J. S., J. W., and J. P. of the second part, and the several persons who should execute, &c., of the third part, &c. The plea proceeded to state, that by the deed certain hereditaments, goods, &c., of the defendant were assigned to J. S., J. W., and J. P. upon trust, subject to certain provisions in the deed mentioned, to discharge certain charges and incumbrances, and pay certain costs, (which were not more particularly mentioned in the plea), and then to apply the surplus moneys in payment of the debts due to the parties of the second and third parts; the defendant covenanted to assist in carrying on the business, &c.; and the parties of the second and third parts covenanted, that if the defendant should observe his covenants, they would not sue him for their debts, and that if they should do so, the deed should be a sufficient release, and the defendant should be thereby released, and as such it should and might be pleaded by the defendant, &c. The plea then averred that the deed contained other provisions; that before the commencement of the suit, to wit, on the 7th of November, 1849, it was executed by divers, to wit, &c., creditors, who were six-sevenths in number and value; that the debt in the declaration mentioned was due to the plaintiffs at that time; that after the said suspension of payment, &c., the plaintiff had notice from the defendant of the execution of the deed. The plea then stated an application to the Court of Bankruptcy for a certificate of the execution of the deed, and the grant of it by that Court, averred a compliance with the several requisites of the act, and alleged a performance by the defendant of the covenants binding on him; whereby the deed became binding on the plaintiffs, and by reason whereof, and of suing the defendant in this action, the defendant, after the commencement of this action, to wit, on, &c., became released, &c. *Held*, upon special demurrer,

First, that the plea was not bad for not setting forth the names of the creditors of the defendant, or the amounts of their debts, or the names of the parties to the deed (*a*);—because to require such statement would lead to prolixity.

Secondly, nor for failing to state the date of the deed with certainty,—because, although the averment preceding the statement of the contents of the deed was obscure, the date sufficiently appeared from the allegation immediately following that statement of the instrument;

Thirdly, nor for not setting forth the provisions, &c., and the primary trusts contained in the deed,—because the contents of the deed concerned the creditors alone, and not the Court.

And fourthly (on general demurrer), nor for not containing a formal averment of the defendant's suspension of payment,—because such suspension sufficiently appeared from the averment of the defendant's inability to pay his debts, followed by references in the plea to the "said suspension of payment."

Held also, fifthly, that the deed operated as a release, and was well pleaded as such; and that it was well pleaded in bar of the further maintenance of the action.

(*a*) See *Kingsford v. Dutton*, *post*, p. 479. See, however, *Rowe v. Roach*, 1 M. & S. 304; *O'Brien v. Clement*, 16 M. & W. 159; S. C. 4 D. & L. 343; and *Williams v. Miles*, 6 D. & L. 433.

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Plea to the first count, and to the other counts as to 45*l.* 16*s.* 2*d.*, parcel, &c., in bar of the further maintenance of the action, that the said bill was accepted on account of the said sum of 45*l.* 16*s.* 2*d.*, parcel, &c. That before and at the time of making the deed hereinafter mentioned, and for six months and upwards before the suspension of payment hereinafter mentioned, the defendant was a trader, to wit, a beer shop keeper and builder, liable to the bankrupt laws, and within the meaning of the statute hereinafter mentioned; that before, and at the time of making the said indenture, he was indebted to the parties of the second part to the said deed, and to other persons, in divers sums, and was, and would be unable to pay the same in full; that the defendant before the time of the making of the said indenture, to wit, after the passing and coming into operation of the statute hereinafter mentioned, to wit, on the 25th of October, 1849, as such trader (*a*), made after the passing and coming into operation of the “Bankrupt Law Consolidation Act, 1849,” and after the 11th of October, 1849, to wit, on the 7th of November, in the year aforesaid, which said indenture, bearing date a certain day and year, to wit, the day and year aforesaid, &c., (*profert*), and made between the defendant of the first part, John Skitt, James Wells, and Joanna Priddy, of the second part, and the several other persons, whose names and seals should be thereunto subscribed and affixed by themselves or their agents, (being creditors of the said defendant), of the third part, it was recited, that the defendant was possessed of certain hereditaments, subject to certain charges therein mentioned; that the defendant had for some time past carried on in the messuage called the Crown and Sceptre, the trade of a beer shop keeper; and that the defendant was indebted in sundry sums unto the parties thereto of the second and third parts, and had agreed to assign all his estate and effects in manner and upon the trusts therein-

(*a*) The words “by an indenture,” were here omitted in the plea as delivered.

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after mentioned. And by the said indenture, in consideration of the covenants thereafter contained, the defendant assigned the said hereditaments, chattels, and effects, and all other his estate and effects, (except wearing apparel), to the said J. S., J. W., and J. P., subject to certain charges and incumbrances, to the payment of certain rents, and to the performance of certain covenants therein mentioned; upon trust, subject to certain provisions therein mentioned, to discharge certain charges and incumbrances, and pay and retain certain costs and expenses; and upon further trust to apply and divide the surplus of the trust moneys in payment of the several debts then due from the defendant to the several persons parties of the second and third parts, without any preference or priority of payment, and rateably and in proportion to the amount of such debts and interest thereon, &c., and to pay any surplus to the defendant, his executors, administrators, or assigns. And the defendant covenanted, that he would from time to time, and at all times thereafter as often as there should be occasion, upon every reasonable request of the trustees, assist in carrying on the said business, and in making up his accounts, and in the settling of any disputes which might at any time arise relative to any of the debts due or supposed to be due from or to the defendant, and in ascertaining and getting in the same according to the best of his power. And by the said deed the parties thereto of the second and third parts severally covenanted with the defendant, that in case the defendant should perform the covenants therein contained, and on his part to be performed, they, and their executors, &c., should not, nor would sue, arrest, implead, or prosecute the defendant, his executors, &c., or issue execution against his or their goods, &c., on account of any debt or sum then due unto them or any of them; and in case any of the said creditors, parties to the said deed, their executors, &c., should sue, arrest, implead, or prosecute the defendant, his executors, &c., for any such debt or sum, then the said deed should be a sufficient release and discharge to all intents

and purposes at law and in equity, for the defendant, his executors, &c., and he and they should be and were thereby acquitted, released, and discharged, against the said creditors, parties thereto, of the second and third parts, and every of them, their executors, &c., who should sue, arrest, imprison, implead, or prosecute the defendant, his executors, &c., and as such should and might be pleaded by the defendant, his executors, &c.

The plea then averred, that the said deed contained certain other provisoes, declarations, and agreements therein set forth; that before the commencement of this suit, to wit, on the said 7th of November, 1849, to wit, at the time of making the said deed the same was sealed by the defendant; that divers, to wit, one hundred of the creditors of the defendant by themselves signed the said deed, and subscribed their names, and affixed their seals thereto, and divers, to wit, one hundred others of the said creditors, by their agents respectively, signed the said deed, and subscribed their names, and affixed their seals thereto; that the said deed at the time of the making thereof, and at all times, was a deed of arrangement between the defendant and his creditors within the meaning of the Bankrupt Law Consolidation Act, 1849, with respect to arrangements by deed, and that the said creditors by whom and on behalf of whom respectively the said deed was signed as aforesaid, were more than six-sevenths, to wit, nine-tenths in number and value of the creditors of the defendant, within the meaning of the said provisions of the said act, whose debts amounted, within the meaning of the said provisions, to the sum of ten pounds and upwards, accounting every creditor as a creditor in value in respect of such amount only, as upon an account fairly stated, after allowing the value of mortgaged property, and other such available securities or liens, from the defendant, appeared to be the balance due to him; that the said creditors, by whom and on behalf of whom respectively their names were subscribed, sealed, and affixed as aforesaid, were more than six-sevenths, to wit, nine-tenths in number

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and value of the creditors of the defendant, within the meaning of the said provisions, whose debts amounted, within the meaning of the said provisions, to the sum of ten pounds and upwards, accounting every creditor as a creditor in value in such respect as aforesaid; that the plaintiffs were, at the time of making the said deed, creditors of the defendant in respect of the causes of action in the introductory part of the plea mentioned, within the meaning of the said act; that at the time of making the said deed the amount in the introductory part of the plea mentioned was a debt then due from the defendant to the plaintiffs, within the meaning of the said deed; that after the said suspension of payment, and after the said deed had been so signed and the names of such majority as aforesaid, of creditors, had been so subscribed, and seals so affixed in manner aforesaid, to wit, on the 2nd of January, 1850, and before the presentation of the petition hereinafter mentioned, the plaintiffs had notice from the defendant of the said suspension of payment and of the said deed of arrangement, and were then requested, to wit, by the defendant to sign and execute the same, and the plaintiffs then might and could (if they would) have signed and executed the same as parties of the second part; that the said bill in the said first count mentioned, was held by the plaintiffs at the time of the making of the deed, and thence, to wit, at all times to the commencement of this suit, and, to wit, at the time of giving them the said notice, and requesting them to sign and execute as aforesaid; that in six months next immediately preceding his said suspension of payment, the defendant carried on business, to wit, as such trader, to wit, within the district of the Court of Bankruptcy, in London; that after he had suspended payment as aforesaid, and after the making, signing, subscribing, &c., the said deed, by and on behalf of the said creditors respectively aforesaid, the defendant, to wit, on the 8th of January, 1850, in pursuance of the provisions of the said act, presented his petition to the said Court of Bankruptcy, in London, praying the said Court

to grant to the defendant an order or certificate declaring or certifying that the said deed of arrangement had been duly signed by or on behalf of six-sevenths in number and value of the creditors of the defendant, whose debts amounted to ten pounds and upwards, accounting every creditor, &c.; that afterwards, to wit, on the 24th of January, 1850, application was made by the defendant to the said Court for an order or certificate in pursuance of the prayer of the said petition; that the plaintiffs more than fourteen days before the making of the said application, to wit, on the 9th day of January, 1850, had notice, to wit, from the defendant that the said petition had been presented to the said Court, and of the said intended application, and of the time when the same would be (and was) thereafter made; that thereupon, and after the said application to the said Court, and within three months from the time at which the plaintiffs had notice from the defendant of his said suspension of payment, and of such deed of arrangement, to wit, on the said 24th of January, 1850, the said Court in pursuance of the said petition and of the said act, and then having jurisdiction over the matters of the said application, did make and give to the defendant a certificate, whereby the said Court did certify and declare that the said deed of arrangement had been duly signed by or on behalf of six-sevenths in number and value of the creditors of the defendant, whose debts amounted to the sum of ten pounds and upwards, accounting every creditor, &c.; that the defendant did from time to time, and at all times from the making of the said deed, as often as there was occasion, upon every reasonable request or notice to him given by the said trustees, to wit, on each day from the said making of the said deed to the commencement of this suit, there being then occasion, and he being thereto in that behalf requested by the said trustees, assist in carrying on the said business, and in making up his accounts, and in the settling of disputes, &c., according to the best of his power and ability, and the defendant did in all things from the said making

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of the said deed to the commencement of this suit, and hitherto, in all respects perform the said covenants therein contained and on his part to be performed; that the said parties of the second part, at and at all times after the making of the said deed, assented to the same, and acted as such trustees, and in the trusts of the said deed; that thereby and thereupon the said deed became and was effectual and obligatory upon the plaintiffs, and as effectual and obligatory in all respects upon the plaintiffs as if they had duly signed the same; that the said deed of arrangement and the said certificate still remain in full force; and that by reason of the matters aforesaid, and of suing the defendant in this action, the said defendant heretofore and after the commencement of this action, to wit, on the 26th of January, 1850, became and was released and discharged from the said causes of action in the introductory part of this plea mentioned, and from the plaintiffs' right to sue for the same. Verification, and prayer of judgment.

Special demurrer, and joinder.

Channell, Serjt., in support of the demurrer. The first objection to the plea is, that it does not state the names of the persons to whom the defendant is alleged to have been indebted, or the amount of the debts due to them, or the names of the creditors who are said to have executed the deed as parties of the third part. "Pleadings must specify the names of persons;" *Steph. Plead.* 338, 5th ed.; and the plea alleges no excuse for the omission to do so. It is very important to the plaintiffs in this case that the names of the persons in question should be set out; because the act of Parliament makes a deed of arrangement executed by six-sevenths in number and value of the creditors binding on the other seventh, who ought, therefore, to have every facility afforded them to ascertain that the requisite number did execute the deed. And this they cannot ascertain, unless they know the names of all the creditors, and also the amount of the debts due to them

respectively. [*Maule*, J.—The plea avers that six-sevenths in number and value of the creditors executed. The plaintiffs may traverse that allegation, and put the defendant to the proof of it.] That would not answer the plaintiffs' purpose; for the defendant would make out a *prima facie* case, by shewing merely that he was indebted to the creditors who executed the deed; and what the plaintiffs want is, the means of inquiring whether the proper proportion of creditors have really executed the deed. In *Gatty v. Field* (a), it was held that the omission of the Christian name in a substantive averment in a plea was a fatal objection on special demurrer, and *à fortiori* ought the omission of both Christian and surnames to be fatal. [*Talfourd*, J., referred to *Kinnersley v. Knott* (b). *Wilde*, C. J.—Is it not the practice in many cases in pleading to refer to persons generally, without setting forth their names, as, ex. gr., is it not usual to allege that the majority of the parishioners, or of a vestry, did certain acts, &c.? (c)] Undoubtedly; and so it is sufficient to allege that a person was elected at an election by the majority of the voters. But in those cases there is a difficulty, or even an impossibility, of ascertaining the names of the persons constituting the class.

Secondly, the plea does not state the date of the deed, or rather, it gives two inconsistent dates. It alleges, that “before the time of the making of the said indenture, to wit, after the passing and coming into operation of the statute herein-after mentioned, to wit, on the 25th of October, 1849, as such trader made after the passing and coming into operation of the ‘Bankrupt Law Consolidation Act, 1849,’ and after the 11th of October, 1849, to wit, on the 7th of November, in the year aforesaid” (d), &c. This passage is unintelligible; at all events, taken in connection with the averment relative to the execution of the deed, which follows immediately

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(a) 9 Q. B. 431.

(c) See *Gosling v. Veley*, 7 Q.

(b) Com. Pleas, Trin. Term, B. 406.

1849. This case will be reported
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(d) *Ante*, p. 459.

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after the statement of its contents (*a*), it leaves it uncertain whether the deed bore date the 25th of October, or the 7th of November.

Thirdly, the plea does not set forth the “certain provisions, declarations, and agreements,” which it avers were contained in the deed (*a*). It ought to have done so, because it is necessary that the Court should be in a position to judge whether the instrument be a deed of arrangement within the meaning of the statute. In this case, indeed, it appears that the trust for the benefit of the creditors is subject to a primary trust to the benefit of which they do not appear to be entitled (*b*); and that circumstance alone affords strong evidence of the necessity of setting forth fully all the provisions of the deed. [*Wilde*, C. J.—The act contemplates no particular trusts. It leaves those to the creditors.] Still, the defendant ought not to be allowed to plead in this compendious way a deed to which the plaintiffs are not parties, and by which they are nevertheless bound.

Fourthly, the plea does not aver that the defendant suspended payment (*c*). The 225th section of the Bankrupt Act provides, that the deed is not to be obligatory upon a creditor who does not execute it, until after three months after he shall have had notice from the trader of his “suspension of payment.” The plea speaks, indeed, of “the suspension of payment hereinafter mentioned,” and afterwards, of “the said suspension of payment,” but it does not aver that any such suspension ever took place. [*Wilde*, C. J.—The plea states that the defendant was “unable to pay his debts in full.”] That is not enough. A person may be unable to pay all his debts at a particular time in full, and yet be in a situation of pecuniary distress falling far short of an actual “suspension of payment.”

Fifthly, even if the deed be binding upon the plaintiffs, it is no bar to the present action. An absolute covenant not to sue, it is not disputed, amounts to a release; but a covenant not to sue for a certain time only, is not a

(*a*) *Ante*, p. 461.

(*b*) *Id.* p. 460.

(*c*) This point was not raised by the demurrer.

release; and if the covenant be broken, the remedy of the covenantee is by action upon it. Here the covenant is, not to sue, "in case the defendant should perform the covenants therein contained, and on his part to be performed (a)." Suppose the defendant failed to observe any of the covenants he entered into, not only would the covenant against suing not be a release, but it would not even be binding on the creditors. This deed, therefore, cannot be pleaded as a release, for if it has that operation now, it must have operated as a release from the moment of its execution, contrary to the manifest intention of the parties. If it was not a release ab initio, when did it become so? [*Maule, J.*—Does not the plea contain an averment that the defendant performed all the covenants which he was bound to perform?] Yes. [*Maule, J.*—Then it was a release at once.] If so, it was a release for ever, notwithstanding subsequent breaches of defendant's covenants. [*Cresswell, J.*—The effect of the deed is simply this: if a creditor sues the debtor in contravention of the bargain made with him, his debt shall be released. As long as the debtor performs his covenants, he is released. If he does not perform them, the creditor, in suing him does not sue him in contravention of the deed. *Maule, J.*—It is a penalty which the parties have agreed to impose. They say, we will have no law suits: any man who sues forfeits his debt.]

Lastly, if the deed be a release it should have been pleaded in bar, and not to the further maintenance of the action; *Gibbons v. Vouillon* (b). [*Maule, J.*—It is properly pleaded to the further maintenance, for the defence does not arise until the action has been brought. It is posterior in point of causation, although there is no interval of time between the bringing of the action and the arising of the defence.]

(a) *Ante*, p. 460.

(b) Com. Pleas, Mich. Term, 1849, cited from 19 *Law Journ.*,

C. P. 74. This case will be reported in 7 D. & L.

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Aspland, contra. First, it is not necessary to set forth the names of the creditors or of the parties to the deed. "A general mode of pleading is allowed where great prolixity is thereby avoided;" *Steph. on Plead.* 392, 5th ed. Here, it is obvious that great prolixity would result from setting out the names in question. The plea states that "divers, to wit, a hundred" creditors executed the deed in person, and that "divers, to wit, a hundred" signed it by attorney. The videlicet may be rejected; *Nash v. Brown* (a); *Ryalls v. Bramall* (b); and then it appears that the creditors who executed the deed are 200 in number, and therefore that to set forth their Christian and surnames would lead to great prolixity. [*Cresswell*, J.—Will the Court reject the videlicet where the number laid under it is not material?] It is usual in pleading to describe a large number of persons in this general way; *Norman v. Thompson* (c); *Brown v. Dakeyne* (d).

Secondly, the date of the deed sufficiently appears. There is, no doubt, some obscurity in the averment respecting it, which has been referred to on the other side: but the Court will on that account wholly reject it as insensible, and then the objection will be got rid of; for the plea, after setting forth the deed, contains a positive and distinct averment that the deed was executed on the 7th of November.

Thirdly, it is not necessary to set forth all the provisions and stipulations of the deed in extenso. What shall be the terms of the arrangement is a matter solely for the consideration of the creditors; and the certificate which, the plea alleges, has been given by the Court of Bankruptcy, is sufficient to satisfy the Court that the deed in all respects complies with the provisions of the act.

Fourthly, enough appears on the plea to enable the Court to collect that the defendant had suspended payment. [*Cresswell*, J.—The plea only speaks of suspension "herein-

(a) 6 D. & L. 329; S. C. 6 C. Exch. 734.

B. 584.

(b) 5 D. & L. 753; S. C. 1

(c) Exch., Hil. Term, 1850.

(d) Q. B., Trin. Term, 1846.

after mentioned," and of "his said suspension of payment." Those words may be rejected. It appears that the defendant became insolvent; that is a suspension of payment. [*Maule, J.*—It is possible that he may have been unable to pay his debts, and yet not have suspended payment. Thus, all his debts may have been payable in futuro, and he may have exhausted all his present assets only.] The certificate of the execution of the deed is sufficient to shew that there was a suspension of payment. But, at all events, the objection cannot prevail, because it is not assigned as one of the causes of demurrer.

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Fifthly, the defendant may avail himself of the covenant against suing, by pleading it, as he has done here, by way of answer to the plaintiffs' claim; and he was not bound to resort for his remedy under it to a cross action; *Gibbons v. Vouillon (a)*.

Lastly, the plea is well pleaded to the further maintenance of the action; for the defence does not arise until after the action has been brought. And it is no hardship to the plaintiffs that the plea is so pleaded, instead of being pleaded in bar; for, according to *Wollen v. Smith (b)*, they might have discontinued without payment of costs.

Channell, Serjt., in reply.

WILDE, C. J.—Although this plea is not perfectly correct in all its parts, it may, I think, upon the whole, be sustained, notwithstanding the objections urged upon the special demurrer. Its validity depends upon the construction of the recent Bankrupt Act, which provides, that a deed executed by certain persons under certain circumstances shall have the same operation as if executed by the plaintiffs; and the question is, whether the plea states that everything has been done so as to make the deed as available against the plaintiffs as if they had executed it.

(a) Com. Pleas, Mich. Term, 1849, cited from 19 Law Journ., C. P. 74. (b) 9 A. & E. 505; S. C. 1 P. & D. 375.

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The first objection made applies to the form in which the deed is set out. It is said, that the names of the several creditors referred to by the recital as the persons to whom the insolvent was indebted are not set out, and, therefore, that no means are given to the plaintiffs for learning whether the deed has really been signed by six-sevenths of the creditors. Now, looking at the general rule which applies to the matter under consideration, this is clear, that whenever prolixity will follow in setting out the names, dates, and sums, they may be dealt with in a general form. This plea states that a deed of arrangement was entered into by an insolvent with his creditors. The defendant is described as a beer shop keeper, but it also appears that he is a builder; and considering the nature of these occupations, it is obvious that the persons with whom he had transactions must have been very numerous. In such a case, it may be predicated that it is unnecessary to state the names of the creditors or the amounts due to them more particularly, as there is a provision in the statute which gives a party the means of ascertaining whether the deed has been duly executed by the necessary number of creditors, and of considering whether he will acquiesce in the arrangement. I allude to the provision, that when the trustee or inspector is satisfied that the proper number of creditors have signed the deed, he is to certify the same to the Court in writing, and that certificate is to be filed with the registrar of the Court (*a*). There are also provisions to coerce the trader to give correct accounts of his debts, and of the names, residences, and occupations of his creditors; so that the matter has not been overlooked by the Legislature. It seems to me, therefore, that this is a case in which it may be reasonably inferred from the subject-matter, that to set out the names would lead to unnecessary prolixity; and it does not appear necessary for the security of the plaintiffs, or that it would lead to any good object.

The next objection is that the plea is informal and un-

(*a*) Sect. 226.

certain with respect to the execution of the deed. And undoubtedly it does appear that some mistake was made in copying the plea. But we must look to every part of the plea, and we then find a distinct averment that the deed was executed upon a certain day for the benefit of the creditors; and it also appears that they were six-sevenths in number and value. That, I apprehend, sufficiently satisfies so much of the statute as relates to the deed.

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Then, what other conditions are there which the statute requires to make the deed binding? It requires that the creditor sought to be affected by the deed shall have notice, for a certain period, of the debtor's suspension of payment, and of the deed; or that the insolvent, who wishes to bind all parties, shall apply to the Court for a certificate that the deed has been duly signed^(a). But in order to warrant that application, he must give notice to all his creditors. Here, it appears that the deed has been signed by the creditors, and that the certificate was obtained after notice given to the plaintiffs, under which they might have come in and opposed the arrangement. It therefore appears to me, that all the conditions which the statute imposes, in order to make the deed effectual as against the plaintiffs, have been performed.

But it is said, that this must depend upon the question whether the Court which gave the certificate had jurisdiction to do so; and that depends on whether the insolvent resided within its jurisdiction for six months before "his suspension of payment." This requires that we should look at what is meant by the word "suspension" in this act. We find that the statute is divided under several general heads; and under one of those heads we find that the object of the Legislature is to further arrangements between a trader and his creditors when he is unable to pay them. There is no special provision as to suspension of payment,—that expression is introduced incidentally. The general object of the statute being distinct, and there being no reason

(a) Sect. 225.

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why the Legislature should be disinclined to give the benefit of the arrangement in the case of actual non-payment, I do not see why they should not have considered that as fit a case to come within its provisions as an actual suspension of payment. Then the language of the act is distinct in shewing the class of persons to whom it applies, that is, traders unable to meet their engagements with their creditors (*a*). It is said that the power given by the act to the Court to grant a certificate of the deed having been executed, arises only where the trader resided or carried on his business within its jurisdiction for six months immediately preceding his "suspension" of payment; but it seems to me that the "suspension" there referred to is satisfied either by a stoppage of payment, where there is no renewal of payment, or by inability to pay generally. That objection, therefore, also falls to the ground.

It is also objected, that it does not appear upon the declaration that the deed is such a deed of arrangement as comes within the act. The statute does not refer to any deed containing any particular clauses, but leaves it to the creditors to say what its provisions shall be. It speaks in very general terms of the nature of the arrangement between a trader and his creditors, shewing manifestly an intention to give the largest discretion to the creditors; and the mode by which it secures the interests of those who do not execute, is by entrusting them to the care of the creditors who do. It seems to me, therefore, not necessary to set out the clauses of the deed, when the statute is silent as to what particular clauses it shall contain, and when the Court would be unable to deal with them if they were set out. If we were required to deal with them, we should be obliged to take into consideration, in each case, the nature of the business of the trader, the number of his creditors, and the particular circumstances of the case, in order to ascertain whether the clauses of the deed were necessary. Even then, the Court could

(*a*) See sect. 211.

hardly form any judgment as to the necessity of the powers which the deed might contain for carrying the arrangement into effect; and it would be most inexpedient that it should be called upon to decide such a question. So, with respect to the trusts of the deed; there may be some trusts which ought to have precedence over others, and of such questions the creditors are the best judges. I therefore think it is not necessary to set out the clauses of the deed.

As to the form of the plea, I think it is sufficient. The deed says, that if the creditors sue the defendant, the latter shall be released; and that the deed shall, in such a case, be pleaded by way of release.

MAULE, J.—I am of the same opinion. The plea is certainly defective in some respects; but whether it is so much so as to be bad either upon general or special demurrer is the question. I think it is not. There is some weight in the objection arising from the omission of the words “by an indenture;” and though my opinion is, that those words may be supplied by what is picked up from the rest of the plea, it will not surprise me if the defendant, upon taking the case to a Court of error, should find that Court inclined to look more narrowly into the form of the plea.

With respect to the insertion of the names of the creditors, I think this case is clearly within the rule which establishes that prolixity is to be avoided. There are cases where although a class may have consisted of only a few persons, yet, if they might have been numerous, the Court has held that the ancient rule of pleading, by which the inconvenience of prolixity is avoided, applied, and that it was sufficient to describe the class generally.

As to the term “suspension of payment,” it must be understood in the sense in which it is used in sect. 225, where that term is first mentioned. That section speaks of it as of something of which the creditor is to have notice. “Suspension of payment” is not there introduced as a new thing mentioned for the first time, but something which

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the framers of the act considered to have been spoken of before. I conceive therefore, that the circumstance mentioned in sect. 224 constitutes a suspension of payment within the 225th section; and that being so, I think the suspension of payment and the notice of it are here sufficiently averred. That circumstance is, the execution of a "deed or memorandum of arrangement" between "such trader" and "six-sevenths in number and value of" his "creditors;" and "such trader," upon looking back to a former part of the act (*a*), means a "trader unable to meet his engagements." When such a person enters into an agreement of the kind mentioned in sect. 224, that is a "suspension of payment" within sect. 225.

With respect to not setting forth the trusts of the deed, I think that all that is essential in this plea is, that it should state those facts which shew that the plaintiff was in effect a party to the deed, although he did not personally execute it. The statute enacts, that if six-sevenths of the creditors agree, and three months' notice is given to the non-assenting creditors of that agreement, or the Court of Bankruptcy grants a certificate of the agreement having been executed by the requisite parties, the deed shall be as binding upon all the creditors as if all had executed it. In fact, it makes the six-sevenths attorneys for the other seventh. The plea, therefore, shews that the deed is in effect the deed of the plaintiff. Then, it is only necessary to state so much of the deed as shews a release of the debt by the plaintiff, viz., that part of it which provides that if the debtor shall do what he is thereby bound to do, the deed shall be pleaded as a release; and in conformity with what was decided in this Court (*b*), I think those words mean that the deed shall be a release. The plea, then, is good; for it states the facts that make the deed binding on the plaintiff, although he did not execute it, and states also the release, without any other statement whatever. If the deed contained any thing inconsistent with that by way of proviso,

(*a*) Sect. 211.

Mich. Term, 1849, cited from 19

(*b*) In *Gibbons v. Vouillon*, Law Journ., C. P. 74.

it should come from the other side; and if it contained matter which shewed that that was not the effect of the deed, that might be shewn under non est factum.

With respect to the plea being pleaded to the further maintenance of the action, I intimated my opinion in the course of the argument (a).

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CRESSWELL, J.—I also think that our judgment must be for the defendant. As to the first objection, that the Christian and surnames of the creditors who executed the deed ought to have been set forth, I think it has been sufficiently disposed of by the observation, that to set them forth would tend to prolixity. The next objection is, that the plea does not allege when the deed was made, and that two inconsistent dates are given. If, however, the first branch of the objection be well founded, the second branch must fall to the ground. Undoubtedly a mistake in copying the plea has introduced this difficulty; but I think we may reject that part altogether, and, looking at the other part of the plea, we can see clearly when the deed was made. The plea begins by saying, that “before the time of the making of the said indenture, to wit, after the passing and coming into operation” of the Bankrupt Act, “to wit, on the 25th of October, 1849, as such trader, made after the passing,” &c., “and after the 11th of October, 1849, to wit, on the 7th of November, in the year aforesaid (b).” Then there is a positive averment of the execution of the deed: “that before the commencement of this suit, to wit, on the 7th of November, 1849, to wit, at the time of making the said deed, the same was sealed by the defendant (c).” The plea, therefore, contains a distinct averment of the execution of the deed.

As to the deed being pleaded as a release, the deed is not the deed of the plaintiff, and the defendant might have been in great difficulty if he had pleaded it as a release. It was not executed by the plaintiff, and therefore he did not

(a) *Ante*, p. 467.

(b) *Id.* p. 459.

(c) *Id.* p. 461.

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release; but his debt was released by act of Parliament. That act says (*a*), that a deed of arrangement, executed by a certain number of creditors, shall operate as beneficially for the debtor and as stringently against the creditor as if the latter had executed it; and the plea, after stating that the deed was executed as required by the act, avers that by means of the premises the defendant was discharged.

With respect to the “suspension of payment;” as that point rests on general demurrer, the defendant is in a more favorable position in respect of it than if it had been raised by special demurrer. The plea states that the defendant was and would be unable to pay his debts in full, and afterwards speaks of his “said suspension of payment.” When a man says that he was indebted to a certain number of persons, and that he could not pay them, I think it is no very forced construction to say that that amounts to an allegation that he did not pay them; and, consequently, that he did suspend payment.

TALFOURD, J.—I am of the same opinion. As to the objection that the names of the creditors and the amounts of their debts ought to have been set out, I think it has received its answer. The case of *Gatty v. Field* (*b*) was altogether different. There the plea professed to set out the names, but did so imperfectly; and there was no presumption that to set them out would have led to prolixity. As to the objection on the ground of uncertainty, there might have been some difficulty in ascertaining what circumstances were pointed at by the term “suspension of payment;” but the deed is set out, and refers to the before mentioned suspension of payment; and taking the antecedent and the subsequent suspension, the deed sufficiently satisfies the allegation of suspension.

Judgment for the Defendant.

(*a*) Sect. 224.

(*b*) 9 Q. B. 431.

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LEVY v. HAMAN.

June 5.

[In the Exchequer of Pleas.

Coram *Pollock, C. B., Alderson, B., Rolfe, B., and
Platt, B.*]

ERROR coram vobis, to reverse proceedings in outlawry.

It appeared upon the record that the outlawry was after final judgment, and that the ca. sa. was returnable "immediately after the execution thereof."

In proceedings in outlawry after final judgment, the ca. sa. should be returnable on a day certain.

Lush, in support of the writ of error. There is error on the record in consequence of the writ of ca. sa. being returnable immediately after execution. At common law there would be clearly error, for the ca. sa. must have been returned on some day certain in Term, and the writ of *exigi* been tested on the *quarto die post* of the return of the ca. sa.; *Tidd's Pract.* 132, 9th ed. The 2 Wm. 4, c. 39, s. 6, which authorizes proceedings to outlawry after final judgment to be taken in actions commenced by writ of summons, makes no alteration in the proceedings; but on the contrary, enacts, that they may be had and taken in such manner and in such cases as may now be lawfully done after judgment in an action commenced by original writ. The plaintiff may rely upon the 3 & 4 Wm. 4, c. 67, s. 2, which enacts, that "all writs of execution may be tested on the day" (on) "which the same are issued, and be made returnable immediately after the execution thereof." The object of that act was to enable parties to proceed in Vacation and obtain the fruits of their judgments. It applies only to cases where the writ is to be executed, but not to outlawry; for if the writ were executed there could be no outlawry, as the party would be in

Where, therefore, it appeared upon the record of such proceedings that the ca. sa. was returnable "immediately after execution," the Court, upon error coram vobis, reversed the outlawry.

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custody. In *Kemp v. Hyslop* (a), it was held, that where a writ of ca. sa. was made returnable "immediately after execution thereof," the bail in the action were not fixed. *Lewis v. Holmes* (b), is an express decision on this point. It was there decided that proceedings in outlawry cannot be founded on a writ of ca. sa. made returnable as this is. Lord *Denman* there said, "It is said that no proceedings to outlawry can be grounded on a ca. sa. returnable immediately after execution, as such writ can only be executed by arresting the defendant, in which case there is no ground for proceeding to outlawry. If he be not arrested, the writ does not become returnable: and the fact of its being returned cannot help, whether it be done by a Judge's order or not: for, strictly speaking, no writ can be returned before it is returnable, although a Judge may order the sheriff to return what he has done upon it, and so in some sense to return the writ."

S. Temple, contra. If *Lewis v. Holmes* is a correct decision, the present case is undoubtedly governed by it; but in *Lewis v. Holmes*, the decision was grounded on the case of *Kemp v. Hyslop*, which does not bear it out. [*Pollock*, C. B.—If there is a clear decision on the point in *Lewis v. Holmes*, we cannot overrule it; the plaintiff ought to go to a Court of error.] Admitting that the writ is incorrect it is only irregular and not void, and the defendant has waived it by not coming in time. [*Rolfe*, B.—But it is on the record; there is no such thing as an irregularity on the record, it is error.]

PER CURIAM.

Judgment for the Defendant.

(a) 1 M. & W. 58; S. C. 4 Dowl. 687.

(b) 10 Q. B. 896, 8.

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June 5, 6.

[In the Common Pleas.

Coram *Wilde, C. J., Maule, J., Cresswell, J., and
Talfourd, J.*]

DEBT. The declaration,—after stating that the plaintiff before, &c., was treasurer to the governors and guardians of the poor of the parish of St. Mary, Newington, in the county of Surrey, constituted and appointed under and by virtue of a certain act of Parliament (54 Geo. 3, c. cxiii), and that plaintiff sued as such treasurer on behalf of the governors and guardians, by force of that statute,—stated, that the defendant, by a bond dated the 11th of

The statement of the names of persons in pleading is not necessary, when it would, by reason of their number, lead to prolixity.

The Court will take judicial notice that the rate-payers of a

parish are so numerous that it would lead to prolixity to set forth their names in pleading.

Upon demurrer to a declaration upon a bond, the judgment of the Court is upon the declaration, and not upon the breaches assigned. Where, therefore, a declaration upon a bond assigned two breaches, one of which was good, and the other bad, the Court gave judgment generally for the plaintiff for the penalty of the bond; and not for the plaintiff upon the good breach for the damages to be assessed upon it, and for the defendant as to the bad breach.

A bond was conditioned to be void if A. B., a poor rate collector, should, when requested by the guardians, pay to such banker or other person as they should appoint, all sums which he should collect when they amounted to 20*l.*; or if, in the event of his not paying according to the direction of the guardians, either of his sureties should, within twenty-one days after notice, pay any sums which he should not have paid according to such direction.

A declaration upon the bond against one of the sureties averred that A. B., after the bond, and before being directed to pay, collected by virtue of his office sums amounting to a large sum, to wit, 470*l.*; and that although a reasonable time for payment had elapsed before action, and before the twenty-one days' notice to the sureties, yet he made default. It then assigned two breaches, the first of which was non-payment by the defendant twenty-one days after notice of the default of A. B.; and the second, that while A. B. was collector he received divers sums, amounting, to wit, to 500*l.* in respect of rates, and the same remained in his hands, and although a reasonable time had elapsed, he had not paid the same, though often requested, to the guardians or their treasurer, or any person appointed by them to receive the same.

Held, upon special demurrer, first, that the declaration was not bad for omitting to aver that legal rates were made and delivered to A. B., or to set forth the names of the persons from whom they were collected; and secondly, that the second breach was not a good breach of either branch of the condition.

An act of Parliament, after appointing a number of persons guardians of the poor of a parish, and declaring that seven should be a quorum, enacted, that the guardians should sue and be sued in the name of their treasurer; and that no action that might be brought by them or any of them in the name of the treasurer, should abate, &c.

A bond for the due performance of a poor rate collector's duties having been executed to seven of the guardians, *held* that an action upon the bond was well brought in the name of the treasurer.

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October, 1843, (profert), acknowledged himself to be bound to Charles Pugh, William Nash, Charles Lane, Thomas Griffin, William Jones, William Fossett, and Richard Allum, in the bond described as, and then being, seven of the governors and guardians of the poor of the said parish, in trust for the inhabitants of the said parish, in 1000*l.*, subject to a certain condition thereinunder written, whereby, after reciting that the said governors and guardians of the poor of the said parish, at a meeting held in, &c., pursuant to the directions of the said act of Parliament, appointed one Richard Ellis Cheeseman to be a collector of the rates for relief of the poor of the said parish and other purposes, &c., and that the defendant and one William Challis had consented to become his sureties for that purpose, and to execute the said bond; it was conditioned, (1) “that if the said R. E. C. should, from time to time and at all times thereafter, as long as he should remain and continue such collector as aforesaid, duly, diligently, and faithfully collect and receive, of and from the several persons liable thereto, all and every sum and sums of money raised,” &c., “upon, for, or in respect of any rate,” &c., already rated, “or which might at any time thereafter be rated,” &c., and “which already had been or thereafter should be delivered to the said R. E. C. to collect;” and (2) “should, when thereunto requested by the said governors and guardians, from time to time pay all such sum and sums of money as he should from time to time levy, collect, and receive, by virtue of his said office of collector as aforesaid, when and as the same should amount to the sum of 20*l.* or upwards, into the hands of such banker or bankers, or other person or persons, as the said governors and guardians should direct and appoint to receive the same;” and (3) should enforce, by all legal means, the payment of such rates; and (4) should deliver to the said governors and guardians, or to such person or persons as they should appoint, true and perfect accounts of all matters and things committed to the charge of the said R. E. C. by virtue of the said act, and

also of all the moneys which should have been received by him, or by any person or persons for his use, by virtue and for the purposes of the said act, together with proper vouchers for such payments, and should pay all such money as should remain due from him to the said governors and guardians, or to such person or persons as they should appoint to receive the same, and should lay his accounts, when required, before the guardians, and verify them; and (5) should deliver up all books, &c.; and (6) should faithfully execute his said office of a collector of the said rates; (7) “or in case the said R. E. C. should make default in payment, according to the direction of any seven or more of the said governors and guardians for the time being, of all or any part of the sum or sums of money which he should have collected and received as such collector as aforesaid; then if the said Thomas Robert Dutton and William Challis, or either of them, their or either of their heirs, executors, or administrators, should pay to the said governors and guardians, or their successors,” “all and every such sum and sums of money as he the said R. E. C. should have collected, levied, or received as such collector as aforesaid, and should not have paid according to the direction of the said governors and guardians, or any seven or more of them, as before mentioned, and that within twenty-one days after the production to the said Thomas Robert Dutton and William Challis, or either of them, or the heirs, executors, or administrators of either of them, or leaving at his, their, or either of their last or usual place or places of abode, a certificate of the balance then remaining due by the said R. E. C., under the hands of seven or more of the governors and guardians, &c., and without requiring or deeming it essential or necessary for the governors and guardians to institute or prosecute any action or other proceedings, at law or in equity, against the said R. E. C., his heirs, executors, or administrators, to ascertain such balance or deficiency, or to enforce or compel the payment thereof as against the said R. E. C., his heirs, executors, or

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administrators;" then the said bond should be void, otherwise should remain in full force. Averment: that the bond was taken in pursuance of the 54 Geo. 3, c. cxiii; that the said R. E. C. was and continued collector of the said rates and assessments in the said condition mentioned, and held that office for a long time after the making of the said bond, to wit, until the 12th of September, 1849; "that the said R. E. C., after the making of the said writing obligatory, to wit, on the 11th of October, 1843, and on divers days and times afterwards, and before he was directed to make payment as hereinafter mentioned, did levy, collect, and receive, as such collector as aforesaid, by virtue of his said office, divers sums of money amounting in the whole to a large sum, to wit, to 470*l.* 12*s.* 5*d.*;" that afterwards, to wit, on the 5th of October, 1849, nineteen of the governors and guardians (whose names were set out) directed the said R. E. C. to pay to the said governors and guardians the sums of money collected by him; that although a reasonable time for the payment thereof, according to such direction, had elapsed long before the commencement of this suit and before the production of the certificate hereinafter mentioned, yet the said R. E. C. did not pay, but made default. First breach: that afterwards, to wit, on the 9th day of November, 1849, there was produced to the defendant a certificate, bearing date, &c., under the hands of seven of the governors, &c. (whose names were set out), of the said sum remaining due by the said R. E. C., and that although twenty-one days after the production of the said certificate had elapsed before the commencement of this suit, yet the defendant and the said William Challis did not nor would, nor did nor would either of them, within that period or at any other time, pay to the governors and guardians, or to any other person or persons on their behalf, the said sum of 470*l.* 12*s.* 5*d.* Second breach: "that after the making of the said writing obligatory, and whilst the said R. E. C. was and continued such collector as aforesaid, to wit, on," &c., "and on divers days and

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times afterwards, the said R. E. C. levied, collected, and received, as such collector as aforesaid, by virtue of his said office, divers sums of money amounting, to wit, to 500*l.*, which had theretofore become and then were due and payable for and in respect of divers rates," &c., "and other purposes," &c., "and the said moneys afterwards, to wit, on," &c., "remained in his hands, and remained and were wholly due from and unpaid by him; and although a reasonable time for him to pay the same," &c., had elapsed before the commencement of this suit, yet he did not nor would, within that time or any other time, although often requested so to do, pay the same or any part thereof to the said governors and guardians, or to their treasurer, or to any person or persons appointed by them to receive the same, &c.

Special demurrer and joinder.

Peacock (*Willes* with him), in support of the demurrer. The declaration is insufficient for several reasons. First, it does not aver the making of any legal rates, or the delivery of them to Cheeseman to collect. It is consistent with what is stated that the 470*l.* which he received were for rates wholly illegal. [*Wilde*, C. J.—Is he to be entitled to keep the money in his pocket because the rate was illegal?] The sureties only undertook to be bound for his paying over all rates made and delivered to him; and if the moneys which he collected were not in payment of a legal rate, they would not be bound for his default in paying them over. The declaration, it is true, alleges that he received the moneys as collector and by virtue of his office; but that is a question of mixed law and fact, depending upon the legality of the rates; *Webb v. James* (a). [*Cresswell*, J.—In that case it did not appear that the collector had collected any rates.] In stating a breach, it is not sufficient to follow the words of the bond. Here, it is necessary to state all

(a) 7 M. & W. 279; S. C. 9 Dowl. 314.

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the facts which shew that Cheeseman had not accounted for moneys received by him in collecting rates legally made; and among such facts must appear those which would enable the Court to judge of the legality of the rate. [*Talfourd*, J.—In an indictment for embezzlement, it is sufficient to state that the money was received by virtue of the prisoner's employment, without setting out the facts; and surely more ought not to be required in a civil proceeding. *Maule*, J.—If this had been the only point, I should have said the demurrer might have been set aside as frivolous.]

Secondly, the declaration does not state the names of the persons from whom the rates were collected; and it contains no averment to excuse such statement, such as that they are very numerous. In *Williams v. Miles* (a), a plea which alleged that the defendant was the treasurer of a society consisting of divers, to wit, fifty persons, was held bad upon the ground now urged. [*Maule*, J.—The Court may take judicial notice that the number of persons from whom the money was collected is so large that it would lead to prolixity if their names were set out. That is the principle upon which we acted in *Phillips v. Surridge* (b). His Lordship referred also to *Lord Arlington v. Merricke* (c). *Cresswell*, J.—*Calvert v. Gordon* (d), *Shum v. Farrington* (e), and *Barton v. Webb* (f) are against you.]

Thirdly, the plaintiff cannot sue upon this bond as treasurer. The 11th section of the act (g), it is true,

(a) 6 D. & L. 433.

(b) *Ante*, p. 458.

(c) 2 Saund. 403.

(d) 7 B. & C. 809; S. C. 1 M. & R. 497.

(e) 1 B. & P. 640.

(f) 8 T. R. 459.

(g) By the 54 Geo. 3, c. cxiii (local and personal) sect. 2, "the rector, churchwardens, and overseers of the poor of the said

parish, and also the justices of the peace for the said county of Surrey resident in the said parish for the time being, together with" thirty-two persons therein named, "and their successors," were "appointed governors and guardians of the poor of the parish of St. Mary, Newington."

The 5th sect. enacts, that no act, order, or determination of

authorizes the governors and guardians to sue in the name of their treasurer; but that provision applies only where the whole body would at common law be plaintiffs. Here the cause of action is not vested in the whole body, but in seven of their number; they therefore must sue, and not the treasurer. In *Everett v. Cooch* (a), it was held, that an enactment, which provided that persons aggrieved by any act done by the trustees of a turnpike act should sue the treasurer, did not authorize an action to be brought against him for the acts of five of the trustees. [*Cresswell*, J.—The 11th section contemplates that actions may be brought by or against some of the guardians, for it says that no

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the governors and guardians should be valid, unless made at a meeting in pursuance of the act; and that all the powers granted to the governors and guardians by the act should be executed and exercised by the major part of those present at any such meeting (the number present at such meeting not being less than seven); and all acts, orders, and proceedings of such major part shall have the same force and effect as if done or made by all the governors and guardians.

The 11th section enacts, “that the said governors and guardians shall and may sue and be sued in the name of their treasurer or clerk; and that no action that may be brought or commenced by or against the said governors and guardians, or any of them, by virtue or in pursuance of this act, in the name of their treasurer or clerk, shall abate or be discontinued by the death or removal of such treasurer or clerk, or by the act of such treasurer or clerk, without the consent of the said

governors and guardians; but the treasurer or clerk to the said governors and guardians for the time being shall always be deemed plaintiff or defendant in such action (as the case may be):” then followed a proviso for reimbursing the treasurer or clerk the costs and charges of any proceedings which he should be chargeable with, by reason of his being made plaintiff or defendant therein.

The 48th sect. enacts, that all bonds or securities already given to any churchwardens or overseers, or other officers of the parish, for indemnifying such parish from any charge for bastard children, or any other document relating thereto, shall vest in the governors and guardians, who shall and may, and they are hereby authorized and required to sue on such bonds or other securities, &c.; and all bonds and other securities hereafter to be given for the same or the like purposes, shall be made to the governors and guardians only.

(a) 7 Taunt. 1.

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action which may be brought by the guardians or any of them, in the name of their treasurer, shall abate, &c. *Maule, J.*—That section speaks of a matter of substance, not of a matter of form. If the guardians choose to bring an action for money which they want to recover in their collective capacity, it says that they shall sue in the name of their treasurer. If this action had been brought in the names of the seven obligees, it would still have been the action of all the guardians; and if that would be so, it was not necessary that they should sue in the names of the seven; they might sue in the name of their treasurer.] The 48th section, which provides that certain bonds “already given” to some of the parish officers may be sued upon by the whole body, seems to lead to the inference that the Legislature did not intend to give the same power with respect to bonds executed after the act. [*Cresswell, J.*—This bond was, no doubt, given to seven of the guardians in consequence of the 5th section making that number a quorum. They may have thought that a bond to seven was equivalent to one made to all. *Maule, J.*—And they were right.]

Lastly, the second breach is bad. It states that after the making of the bond, to wit, on, &c., Cheeseman collected, by virtue of his office, moneys payable for poor rates, and that although a reasonable time had elapsed for him to pay them, he had not done so; but it contains no averment that the sureties had twenty-one days’ notice of his default, which, it is submitted, upon the true construction of the condition of the bond, is a condition precedent to the liability of the sureties. [*Maule, J.*—We do not give judgment upon the breach, but upon the declaration. Assuming that the second breach is bad, still, if the first be good, the declaration is sufficient.] It is apprehended that the judgment of the Court in that case would be, as to the first breach, for the plaintiff, and as to the second, for the defendant. Suppose the defendant had traversed the one and demurred to the other, and the latter was held bad,

the Court would have given judgment for the defendant, although a jury had assessed damages on the first breach.

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[The Court intimated that their opinion was against the defendant on the first three points.]

Collier, contra. The second breach is good. The condition of the bond consists in truth of seven independent conditions, upon the breach of any one of which the bond is forfeited. The second breach averred in the declaration is, in truth, pointed at the second of those conditions, which provides that Cheeseman should, when requested by the governors, pay the sums which he should collect, when they should amount to 20*l*., into the hands of such banker or other person as they should appoint,—and not to the seventh, as has been assumed on the other side. [*Cresswell*, J.—There is this difficulty in your argument: the second condition is to pay, not to the governors, &c., but to such banker, &c., as they should appoint. Now, your breach is not framed upon that; for the declaration does not aver non-payment to their banker, &c. *Wilde*, C. J.—The condition is to pay their banker; the breach alleged is non-payment to the governors and guardians or to their treasurer, or to any person appointed by them to receive the money. That clearly does not follow, in precise words, the condition you refer to; the question is, whether it follows it in substance.] The word “person” will include “banker.” [*Maule*, J.—That is doubtful; the former does not include bodies corporate, the latter probably does. But the declaration does not allege that the governors ever appointed a banker or other person to receive the money. If they did not do so, what is stated in the breach may be true and yet the bond not be forfeited. *Talfourd*, J.—The declaration does not even state that the sums collected by Cheeseman ever amounted to 20*l*., for the sum alleged to be in his hands is laid under a videlicet.] At all events,

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as the first breach is good, the judgment will be for the penalty of the bond.

Willes, in reply. At common law the declaration would have been bad for duplicity. The statute of 8 & 9 Wm. 3, c. 11, empowered the plaintiff to assign several breaches, for the purpose of enabling him to have the damages assessed; but he has no right to avail himself of this privilege for any other purpose. The judgment at common law would have been that the declaration was sufficient, and that the plaintiff should recover the penalty: since the statute it must be, that the declaration is sufficient, and that the plaintiff recover the amount assessed. If the latter be the correct form, then the writ of execution issues, according to the truth, for the amount assessed; but if judgment be given for the penalty, the writ (which is an act of the Court) must be issued for a sum which is not the true amount to be levied, and must be indorsed with that amount, which is the act of the plaintiff. [He referred to *Dawson v. Wrench* (a); *Lush v. Russell* (b); *Gainsford v. Griffith* (c), and *Roberts v. Mariett* (d).]

WILDE, C. J.—This case is involved in some complexity in respect of the statute. The objections to the declaration have been already considered, and decided in the plaintiff's favour; and the only question now is, whether the plaintiff is entitled to the same judgment as he would have been entitled to at common law. It seems to me that he is. He has shewn a good breach of the condition of the bond; and our judgment must therefore be for the penalty of the bond. It is not necessary for the Court, in pronouncing what its judgment is, to go into any other matter. It will

(a) 6 D. & L. 474; S. C. 3 p. 56.
Exch. 359.

(b) Exch., Mich. Vac. 1849,
cited from 19 Law Journ., Exch.,

(c) 1 Saund. 51.

(d) 2 Saund. 188.

be for the plaintiff, when he has the damages assessed, to take care that they are not assessed upon the bad breach. The judgment of the Court upon this demurrer is, that the declaration is sufficient, and that the plaintiff is entitled to judgment for the penalty of the bond.

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MAULE, J.—I am of the same opinion. The first breach being good,—the objections to it having been disposed of during the argument,—the plaintiff is entitled to judgment, and that judgment must be, “therefore, it is considered, that the plaintiff do recover the penalty of the bond;” and that is not to be varied by the fact that one of the other breaches of the bond is bad.

CRESSWELL, J.—I am also of the same opinion that the plaintiff is entitled to our judgment for the penalty of the bond. He has shewn upon his declaration a bond executed by the defendant, with a condition which has been broken. The defendant says that the declaration is not sufficient in law: it is true, he goes on to point out certain special grounds of objection, but in substance he says that the declaration is not sufficient in law. I think it is sufficient in law; and therefore that the plaintiff must have judgment for the amount which the declaration states is owing to him.

TALFOURD, J., concurred.

Judgment for the Plaintiff.



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June 6.

In re a Plaintiff in the County Court of NORFOLK,

Between ROBERTSON and Another,
and
WOMACK.

[*Bail Court. Coram Wightman, J.*]

The Court will not entertain an application for a certiorari to remove a plaintiff from the County Court under the 9 & 10 Vict. c. 95, s. 90; it being the proper subject of an application to a Judge at Chambers.

PALMER moved for a certiorari to remove a plaintiff in the County Court of Norfolk, held at Great Yarmouth, into this Court, under the 90th section of the 9 & 10 Vict. c. 95.

WIGHTMAN, J.—This is the subject of an application at Chambers.

Palmer. There is some doubt whether in Term time the parties may not come to the Court.

WIGHTMAN, J.—The 90th section does not say that the certiorari is to issue “by leave of the Court;” the words are, “by leave of a Judge of one of the said superior Courts.” That means a Judge at Chambers. I have had these applications constantly before me at Chambers.

Writ refused.



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REGINA on the Information of WILLIAM WESTON v.
WILLIAM ASTON.

June 5, 8.

[*Bail Court. Coram Wightman, J.*]

THIS was a rule calling upon two justices of the county of Stafford and William Weston to shew cause why the said justices should not take the recognizances before them of William Aston, in the penal sum of 10*l.*, with two sufficient sureties in the penal sum of 10*l.*, upon condition to prosecute with effect an appeal of the said William Aston against a conviction made under the hands and seals of the said justices under the 6 Geo. 4, c. 129.

The following facts appeared upon the affidavits. On Thursday, the 2nd of May, 1850, Aston was convicted before two justices of the county of Stafford at Tunstall, in that county, under the 6 Geo. 4, c. 129, s. 3, of having endeavoured by threats and intimidation to force one William Weston to depart from his employment and work, as an iron-hoop roller; and was thereupon committed to the House of Correction at Stafford, to be imprisoned and kept to hard labour "for and during the space of three calendar months." He was defended by an attorney of the name of Heaton, who, it appeared, left the Court before the sentence was pronounced. On Saturday, the 4th of May, Mr. Roberts, an attorney, living at Manchester, and by whom the affidavit in support of the rule was made, was

The word "immediately," in the 6 Geo. 4, c. 129, s. 12, which enacts that the execution of every judgment appealed from shall be suspended "in case the person so convicted shall immediately enter into recognizances," means "promptly and expeditiously," having regard to all the circumstances of the particular case.

The prisoner was convicted on a Thursday of an offence against the 6 Geo. 4, c. 129. The attorney, who attended on his behalf, left the Court before sentence pronounced, and

the prisoner was taken at once to Stafford gaol. His friends instructed an attorney, who lived at Manchester, to take the necessary steps on his behalf. The justices met in petty sessions at some distance from the place where the prisoner was confined. Nothing was done on the Friday, but on the Saturday, the prisoner was prepared to give notice of appeal and enter into recognizances, but the justices did not sit on that day. On the Monday, he offered to enter into recognizances before the justices, which they refused to receive: *Held*, that the application was not too late, and that the justices ought to have received the recognizances.

The remedy by rule under 11 & 12 Vict. c. 44, s. 5, is not simply for the benefit of justices, and confined to cases in which their jurisdiction is doubtful; but extends to all cases in which they refuse to do an act relating to the duties of their office.

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consulted by letter by Aston's friends, who informed him that Aston felt himself aggrieved by the decision and was desirous of appealing against the conviction. He advised them to appeal forthwith, and to apply to the justices to be allowed to enter into recognizances with two sureties as required by the act. They accordingly prepared to do so; but in consequence of the justices not sitting in petty sessions at Tunstall on that day, they were unable to make the application. On Monday, the 6th, Roberts, as his attorney, made the application to the same justices, who were sitting at Hanley in the same county. They took time to consider the application till the following day, when they refused to take the recognizances on the ground that the application was made too late. The present rule was obtained on the second day of the present Term.

T. Jones shewed cause. The object of the 11 & 12 Vict. c. 44, s. 5, under which this rule was obtained, is to protect justices in the exercise of their functions in cases of doubtful jurisdiction; and it does not apply to a case like the present.

WIGHTMAN, J.—I will not say what the object of the statute, generally, is; but that section substitutes a rule in lieu of a mandamus, in order to prevent expense, “in all cases, where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office.” Those words seem large enough to embrace the present matter.

T. Jones. The justices acted rightly in refusing to take the recognizances. The 6 Geo. 4, c. 129, s. 12, enacts, that “if any person convicted of any offence” “punishable by this act, shall think himself aggrieved by the judgment of such justices,” “such person shall have liberty to appeal from every such conviction to the next Court of general sessions or general quarter sessions,” &c. And “that the

execution of every judgment so appealed from shall be suspended, in case the person so convicted shall immediately enter into recognizances before such justices." The defendant is bound under this section to tender the recognizances at the time when the adjudication of the justices is pronounced, and before any part of the sentence is executed. The word "immediately" must mean the time of the adjudication; and the subsequent provisions of the section strengthen this construction. It proceeds to enact, that if he does enter into such recognizances and the conviction on appeal is confirmed, the appellants "shall immediately be committed" "to the common gaol," &c., "according to such conviction and *for the space of time therein mentioned.*" That sufficiently shews that the intention of the Legislature is that he should enter into the recognizances before any part of the imprisonment is undergone.

Should, however, the Court be of opinion that the word "immediately" is to be construed as meaning "within a reasonable time;" it is submitted that even then, under the circumstances of this case, the defendant has not brought himself within that condition.

Huddleston, in support of the rule. There is some difficulty in defining when the "execution" of the sentence commences. If it be at the moment when the justices pronounce their adjudication, it is only where a defendant expects to be convicted that he would be enabled to avail himself of the benefit of the provision. If it is from the time when the gaoler receives him into his custody, he has no longer the opportunity of tendering bail, except through his friends or his legal adviser, and he must be allowed a reasonable time for consulting with them and procuring the bail. Even if the former construction were adopted, some time must necessarily elapse to inquire into the sufficiency of the bail. But the latter construction, it is sub-

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mitted, is the right one. Where the word “forthwith” has been used in a statute, it has been held to mean “within a reasonable time;” *Burn’s Just.* vol. 6, p. 261, 29th ed. tit. “Time;” *Spenceley v. Robinson* (a); *Reg. v. Robinson* (b); *Ex parte Lowe* (c). So the word “immediately” has received the same signification; *Thompson v. Gibson* (d). In that case, *Alderson, B.*, in giving judgment, refers to an express decision of Lord *Hardwicke*, on the interpretation of this word in *Rex v. Francis* (e), where the latter observes, “It was said, that the word ‘immediately’ excludes all intermediate time and action; but it will appear that it has not necessarily so strict a signification. *Stephens*, in his *Thesaurus*, expounds the word ‘immediately,’—‘citò et celeriter;’ so *Cooper’s Dictionary* renders, in English, ‘immediately,’—‘forthwith, by and by;’ and *Minshew* gives it as various meanings, and refers it to the word ‘presently.’ Nor is its signification more confined in legal proceedings,” &c., and his Lordship then proceeds to give various instances in which the word has received a liberal signification. *Christie v. Richardson* (f); *Page v. Pearce* (g); *Rex v. Justices of Huntingdonshire* (h), are authorities to the same effect.

If then the word “immediately” is to receive the ordinary and reasonable construction which has hitherto been put upon it, the application in the present case, it is submitted, was not too late, and the justices were not authorized in refusing it.

Cur. adv. vult.

(a) 3 B. & C. 658; S. C. 5 D. & R. 572.

(b) 12 A. & E. 672.

(c) 3 D. & L. 737. See also *Tennant v. Bell*, 9 Q. B. 684.

(d) 8 M. & W. 281, 7, 8; S. C. 9 Dowl. 717.

(e) Ca. temp. Hardw. 114.

(f) 10 M. & W. 688; S. C. 2 Dowl. 503, N. S.

(g) 9 Dowl. 815; S. C. 8 M. & W. 677.

(h) 5 D. & R. 588.

WIGHTMAN, J.—This was a rule calling upon two justices of the county of Stafford to shew cause why they should not take the recognizances of one William Aston and his two sureties, under the 6 Geo. 4, c. 129, s. 12.

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It appeared, that on the 2nd of May, 1850, Aston had been convicted of an offence against the 6 Geo. 4, c. 129, s. 3, for attempting by threats and intimidation to force one Weston to depart from his employment. The conviction took place on a Thursday, and he was the same day taken to prison in pursuance of the sentence, not having at that time given any notice of appeal or having entered into any recognizances under the statute. He wished to appeal, but, being in prison, could take no steps himself. On the Saturday following, however, he was prepared with sureties and was ready to enter into the necessary recognizances, but there was no meeting of the magistrates on that day. On the following Monday, he offered to appeal and to enter into recognizances with his sureties; but the justices thought that he was too late, and that they could not, under the 12th section of the act, take the recognizances.

By that section, “if any person convicted of any offence,” “punishable by this act, shall think himself” “aggrieved” “by the judgment of such justices,” “such person shall have liberty to appeal from every such conviction to the next Court of general sessions or general quarter sessions,” &c. Now, as to this part of the section, there is no other limitation to the right of appeal, than that it is to be to the next sessions. The section then goes on to say, “that the execution of every judgment so appealed from, shall be suspended, in case the person so convicted shall *immediately* enter into recognizances before such justices (which they are hereby authorized and required to take,) with two sufficient sureties in the sum of 10*l.* upon condition to prosecute the appeal; “and the justices in the said next Court of” “quarter sessions are hereby authorized and required to hear and determine the

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matter of the said appeal ;” “and if upon hearing the said appeal, the judgment of the justices before whom the appellant shall have been convicted shall be affirmed, such appellant shall immediately be committed by the said Court to the common gaol or house of correction according to such conviction, and for the space of time therein mentioned.”

I have not found it easy to arrive at a satisfactory construction of this section, on account of the difficulty in reconciling the object of the provision, with its strict words. The intention of the Legislature seems to be to allow a party wishing to appeal against the conviction to do so without undergoing the sentence which might ultimately be reversed; the words used, seem to require an immediate tender of bail, which he may not be able to procure upon the spot, and if he did not anticipate a conviction may not have been prepared with beforehand. If a strict literal construction of the words be adopted, in the majority of cases, the benefit intended by the statute would be perfectly illusory.

There are, however, many cases in which it has been held that the word “immediate” occurring in a statute is not to be construed in its strictest sense “on the instant;” but that it means with a reasonable promptness, having regard to all the circumstances of the particular case. The strongest authority, perhaps, is that of *Rex v. Justices of Huntingdonshire* (a). There the statute, the 1 Geo. 4, c. 56, s. 5, gave an appeal on condition that the party should give “immediate notice of such appeal, and of the matters thereof;” and though it was held, in that case, that a notice of appeal seven days after a conviction was too late, the judgment of the Court is in favour of the construction contended for on the part of the prisoner in the present case. Lord Chief Justice *Abbott*, in giving judgment says, “It

(a) 5 D. & R. 588, 9.

is not necessary in this case to decide, whether the words 'immediate notice,' are to be construed so strictly as to require that the notice should be given before the party quits the justice's room upon the determination of the complaint. But they must mean *prompt* and *expeditious* notice." In that case, the Court held that a notice of appeal after a lapse of seven days, which were not accounted for, was too late, giving the most liberal construction to the word "immediate." That case, however, is an authority for putting a reasonable interpretation on the language of the Legislature, by holding that the word "immediately" means "promptly and expeditiously."

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If that be so, it is not necessary that the recognizances should be taken at the moment, for even if the party convicted have his bail ready, some space of time must elapse before an inquiry can be made into their sufficiency. On the other hand, it is also clear, that the Legislature did not intend that the prisoner might at any time during the term of imprisonment, find bail and be released.

It seems to me that the act must mean that some middle period of time must be allowed; and that though the prisoner has no right to come at any time he pleases and apply to be bailed, yet that he is entitled to be discharged on recognizances if he applies promptly and expeditiously according to the circumstances of the case.

The question then is, did the prisoner in the present case come "promptly and expeditiously," under the circumstances of the case?

The conviction took place upon a Thursday. The prisoner had no time to enter into the recognizances then, for his attorney had gone away before the sentence was pronounced; and he was at once taken to gaol.

It was indeed hardly contended on the argument, that he was bound to enter into recognizances at the instant of the conviction, or even that he should do so on the same day. But it was said that on the next day, at least, he ought to have been prepared. The next day, however, he was in prison,

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and some time must be allowed for communicating with his friends, and his attorney, who, it appears, lived at Manchester. On the Saturday, he was ready to enter into the recognizances, but could not do so, as the magistrates did not sit on that day. The Sunday intervened, and on the Monday he offered to enter into the recognizances which the magistrates refused to take.

Looking, then, at all the circumstances of this particular case, and at the fact that the magistrates met at a considerable distance from the place in which the prisoner was confined, I have, though not without some hesitation, come to the conclusion that this application is not too late, and that the present rule must be made absolute.

It was suggested, however, that a difficulty would arise from this construction, as the act says, that the execution of the judgment shall be "suspended," and that in the case of the judgment being affirmed on appeal, the party shall be committed to the common gaol or house of correction according to such conviction for the space of time "therein" mentioned. It was said, that that must intend that the bail should be tendered before the sentence executed; but I think that upon the same reasonable construction before adopted, the words, shall be committed for the space of time "therein" mentioned, may mean such portion of it as is unexecuted, and not the entirety.

Rule absolute.



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REGINA v. STEPHEN KELCEY.

June 8.

[*Bail Court. Coram Wightman, J.*]

THIS was a rule nisi for a feigned issue to be directed to try whether certain waste lands, in the parish of Lyminge, in the county of Kent, known as High Minnis, or any part thereof, were or not parcel of the manor of East Leigh, in the same county.

The following facts appeared upon the affidavits in support of the rule. An award had been made by N. W., an assistant inclosure commissioner, determining the boundary of the manors of East Leigh and Lyminge, in the county of Kent, by which certain waste lands, called High Minnis, were excluded from the boundary of the former, and included in that of the latter manor. Mr. Kelcey, the lord of the manor of East Leigh, was dissatisfied with the award of the commissioner, and had taken the steps pointed out by the 44th section of the Commons' Inclosure Act, (8 & 9 Vict. c. 118), and obtained a writ of certiorari to remove the assistant commissioner's determination to this Court (*a*), which award had been removed accordingly. The notice which Kelcey served on the commissioner in pursuance of the 39th section of the act, stated the following grounds of dissatisfaction:—

That the boundaries are not correctly ascertained and set out by the award;

That High Minnis is within and parcel of the manor of East Leigh;

That a great part of High Minnis is situate within the parish of East Leigh;

That the award was come to upon improper and illegal evidence; and

That the award is bad on the face of it.

Where the determination of an assistant inclosure commissioner has been removed into this Court by certiorari, under the 8 & 9 Vict. c. 118, s. 44, the Court will grant a feigned issue, where the party applying for it is really interested in the question, and dissatisfied with the determination; although the affidavits in support of the application do not shew that any further evidence can be adduced than was or might have been given before the assistant commissioner.

(*a*) *Ante*, p. 55.

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Affidavits of a gamekeeper, and others, were relied on as proving that the conclusion to which the assistant commissioner had come was incorrect; but it was not shewn that Mr. Kelcey had been taken by surprise at the investigation before the commissioner, or that any fresh evidence had been discovered which could not have been adduced at that time.

It appeared from the affidavits in opposition to the rule, that Mr. Kelcey's claim had been, with his consent, investigated and disallowed on a previous occasion, by R. H., another assistant commissioner, who had been sent down to inquire into the expediency of the inclosure in question.

Deedes shewed cause, on behalf of the lord of the manor of Lyminge. The question is, whether the present rule is a mere rule of course, or whether the Court will exercise a discretion in granting it, and require some sufficient ground to be stated before it will do so. It is submitted, that under the terms of the act under which these proceedings are taken, the 8 & 9 Vict. c. 118, the latter is the proper construction. By sect. 39, the assistant commissioner is empowered to ascertain and set out the boundaries of any parish or manor, in which lands, which are proposed to be inclosed, are situated; and if any one is dissatisfied with his determination, he may either give notice that he requires a jury to be called to settle the matter, (whose verdict is to be "conclusive" as to the boundaries), or that he is desirous of removing the determination into this Court by certiorari. By the 44th section, "the decision" of this Court, upon such determination being removed by certiorari, is to "be final and conclusive as to the boundaries." It is submitted, therefore, that the intention of the Legislature was, that if the party interested sought to dispute the assistant commissioner's determination upon the fact, and wished to have the opinion of a jury on the subject, he should take it in the mode pointed out by the 39th section; if, on the other

hand, he was desirous of obtaining the decision of this Court on its validity, either in law or in fact, he should proceed to remove it into this Court by certiorari, and obtain a decision on it here. It is true, a power is given to this Court, by the 44th section, "to direct the trial of one or more feigned issues upon such points as the Court shall think fit;" and upon these words the present application is founded; but it is submitted, that they have merely reference to points upon which the Court see a difficulty, and not to points upon which one of the parties alone seeks to raise it. But even if the Court should be of a different opinion, it is submitted that it will not direct a feigned issue, except upon some stronger ground than is here set forth. It does not appear that any fresh evidence has been discovered, which was not, or might not have been, adduced before the assistant inclosure commissioner. The case of *Reg. v. Merson (a)*, is strongly in point. That was the case of an award under the Tithes' Commutation Acts, settling the boundary of a parish, and there the Court had power, by the 35th section of 2 & 3 Vict. c. 62, when the award had been removed into this Court by certiorari, to direct a feigned issue to be tried upon such points as the Court thought fit; and it was held, that the Court would not, as of course, order a feigned issue to be tried at the instance of a party dissatisfied. Lord *Denman*, C. J., in giving judgment, says, "It is now assumed that, in case of such removal," (*viz.*, by certiorari), "the power exercised by the commissioners may be questioned by any person under almost any circumstances." "But I think that the power given to the commissioner is not so qualified. The act assumes that he may do justice by his decision: and, unless it be shewn to us that he has done wrong, we ought not to set it aside merely because a party expresses dissatisfaction with it."

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Welsby, on behalf of the inclosure commissioners,

(a) 3 Q. B. 895, 8—9.

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expressed their desire to leave the matter to be disposed of as the Court should think fit.

Shee, Serjt., and *Prentice*, in support of the rule. The circumstances in *Reg. v. Merson* (a), differ widely from those in the present case. There the affidavits offered no proof that the assistant commissioner had come to a wrong conclusion, nor did they shew that the party on whose behalf the motion was made, knew anything of the question, or had any interest in it. The utmost that that case decides is, that the Court has some discretion in granting a feigned issue. Besides, the question there arose under the Tithe Commutation Act, which simply enacts, that upon the removal of the determination of the assistant commissioner into this Court, "it shall be lawful for the Court to direct the trial of one or more feigned issues upon such points, as the Court shall think fit." Here there are elaborate provisions for reviewing the decision of the inclosure commissioners. The intention of the Legislature clearly is, that where a party is dissatisfied with the determination of the inclosure commissioners upon the fact, he is to have the decision of a jury on the subject, in one of two ways, which decision is to be binding and conclusive on all persons whomsoever. By the 39th section, he may require the commissioners to issue their warrant to the sheriff to summon a jury, who, presided over by the assistant commissioner, are to hear the evidence, and decide upon the boundaries; and the commissioners have no discretion to refuse the application. If, however, the question is of greater importance, and the party wishes to have it tried before a Judge of the superior Courts at the assizes, he may, by sect. 44, remove it as a matter of course (b) into this Court, and make an application like the present to have a feigned issue directed. All that the Court, it is submitted, will require to be shewn before they grant

(a) 3 Q. B. 895.

(b) See *Ex parte Kelcey*, ante, p. 55.

a feigned issue is, that the party applying is a party really interested in the question, that he bonâ fide disputes the propriety of the assistant commissioner's determination, and that he is desirous of trying the question before a jury. The applicant is liable for all the expenses, if he has no ground for dissatisfaction with the determination, and the Court will therefore be slow to deny him the right, which the statute has conferred upon him, of trying the question before a jury.

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WIGHTMAN, J.—It seems to me to be clear that the intention of the act was that the determination of the inclosure commissioners as to the boundaries should be final, unless the party dissatisfied with their determination should question it by one of two modes;—either by requiring the commissioners to summon a jury to determine the boundaries, whose finding is to be reduced into writing, and the boundaries to be amended by the commissioners accordingly, and such amended boundaries to be thereupon “conclusive on all persons whomsoever;” or by moving the determination of the commissioners into the Court of Queen's Bench by certiorari, in which case the 44th section says, “the decision of the said Court,” that is, the Court of Queen's Bench, is to be “final and conclusive as to the boundaries of such parish or manor.” In order, however, to enable the Court of Queen's Bench to come to a decision which is to be “final and conclusive,” power is given to the Court to direct the trial of a feigned issue “upon such points as the Court shall think fit, and also to direct who shall be the plaintiff or plaintiffs, and who shall be the defendant or defendants on such trial, or to determine the same in a summary manner, or otherwise dispose of the question or questions in dispute, and to make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable.”

Now, it has been urged by Mr. *Deedes*, that the question of fact has here been referred to the competent tribunal,

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and that, by not appealing, in the manner pointed out by sect. 37, to the verdict of a jury, the decision to which the inclosure commissioners have come is final, and ought not to be reviewed. But in all cases in which the question can come before this Court, there must have been a decision in the first instance by the inclosure commissioners, and the boundaries decided on evidence adduced by both sides, without the opinion of a jury being taken.

Then, how is this Court to deal with the question? Either by determining it on the facts stated in the affidavits "in a summary manner;" or by directing the trial of a feigned issue; or by deciding that no sufficient grounds are shewn for inquiring into the propriety of the commissioners' decision at all.

It seems to me, that as the decision of this Court is to be final and conclusive upon the parties, it would be too much to say, that where the party is dissatisfied with the determination of the inclosure commissioners, this Court should decide the case on the determination of the commissioners, and refuse to allow it to be questioned.

I was at first struck with the case cited (*a*), but it seems to me that it is distinguishable from the present, and that it may have been decided on the ground suggested by my Brother *Shee*, namely, that the application there was made on behalf of a party who was not shewn to know anything about the matter, or to have any actual interest in it.

Here the question is between two lords of manors, who are clearly parties interested.

The question then comes, what is the most satisfactory mode of determining these boundaries? And it seems to me that that is, undoubtedly, by directing a feigned issue to be tried. The rule must therefore be absolute.

Rule absolute (*b*).

(*a*) *Reg. v. Merson*, 3 Q. B. 895.

(*b*) The question of costs reserved by the rule.

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DUKE OF BRUNSWICK v. HARMER.

June 8.

[In the Queen's Bench.]

Coram *Lord Campbell, C. J., Patteson, J., Coleridge, J.,
and Erle, J.*

A RULE nisi for a new trial in the above action having been moved for by the defendant in last Michaelmas Term (2nd of November), on the ground of misdirection, and upon affidavits, the Court took time to consider the application, and on the 16th of November, refused a rule upon the ground of misdirection, but granted it upon the affidavits; the jurat of one of which was as follows: "Sworn the — day of November, 1849."

An affidavit,
the jurat of
which was
"Sworn the
— day of
November,
1849:" Held
defective.

The plaintiff, in person, now shewed cause, and took a preliminary objection to that affidavit being used, as it did not shew the day on which it was sworn. In *Wood v. Stephens* (a), the jurat omitted to state the month in which it was sworn, and the defect was held to be fatal. In *Blackwell v. Allen* (b), the affidavit was without date, and the Court in discharging a rule obtained on it, said, that in future they should discharge a rule similarly obtained with costs. *Houlden v. Fasson* (c), and *Shaw v. Perkin* (d), are authorities to shew that the Court will not permit deviations from the form which the practice of the Court requires should be observed in the jurat of affidavits. There is besides a case expressly in point, where the Court of Common

(a) 3 Moore, 236.

div. 3 M. & P. 559.

(b) 7 M. & W. 146.

(d) 1 Dowl. 306, N. S.

(c) 6 Bing. 236; S. C. *nom.*

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Pleas held a similar defect to the present to be fatal; *The Duke of Brunswick v. Sloman* (a).

Sir *F. Thesiger* (*Martin* with him) *contra*. This Court is not bound by the decision in the Court of Common Pleas. As the present rule was moved for on the 2nd of November, the affidavit must have been sworn on that day, or on the 1st. [*Erle*, J.—The affidavit may have been irregular, and leave may have been given to amend it, and the rule been granted on the affidavit so amended. *Coleridge*, J.—The sufficiency of a jurat may be tested by considering whether an indictment for perjury could be maintained.] In an indictment for perjury it would be sufficient to state and prove the day on which it was really sworn.

LORD CAMPBELL, C. J.—We ought not to leave nice questions to be raised on an indictment for perjury. The jurat of an affidavit should distinctly state the time when it is sworn; and it does not do this, if either the day, the month, or the year is omitted. The case decided in the Common Pleas is expressly in point. The broad rule ought to be observed. I think that this affidavit cannot be read.

PATTESON, J.—I think that we ought to hold parties strictly to the form, which is easy to be observed; and although in the present case the variance may appear to be immaterial, as the Court would know when the affidavit was used, it is possible to conceive cases in which the date in the jurat might be material.

COLERIDGE, J.—There is another rule as to affidavits, namely, that no affidavit shall be read in which there is an

(a) Common Pleas, November 24, 1849.

erasure; and yet in many cases the erasure might be perfectly immaterial. But to embark in that inquiry would not only give rise to some discussion and consume time, but open a door to fraud, and increase the expenses of litigation.

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ERLE, J., concurred.

The rule was then argued on the other affidavits, and subsequently made absolute (a).

(a) See *In re Lloyd*, post, p. 545.



MONTGOMERY and Another v. BROGGREFF.

June 10.

[*Bail Court. Coram Wightman, J.*]

THIS was a rule to enter a suggestion to deprive the plaintiff of costs, under the County Courts' Act.

The affidavit in support of the rule was made by the defendant, and stated that the action was "founded on contract, and that the debt claimed herein" was less than 20*l*. That the cause was tried in the Sheriffs' Court in the City of London, and a verdict found for the plaintiff for 19*l*. 6*s*., and no more. That "the cause of action did arise in a material point within the jurisdiction of the said County Court, within which this deponent dwelt at the time of this action being brought." It contained the other usual statements necessary to bring the case within the 129th section.

An affidavit in support of a suggestion under the County Courts' Act, to deprive the plaintiff of costs, simply stated that the action was "founded on contract;" that "the debt claimed herein" was less than 20*l*.; and that "the cause of action did arise in a material point within the jurisdiction" of the County Court. It contained the other usual statements

Dowdeswell shewed cause. The affidavit is insufficient.

necessary to bring the case within the 129th section: *Held* sufficient to entitle the defendant to enter a suggestion, the plaintiff making no affidavit in answer.

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The defendant only swears that the action is “founded on contract.” It is consistent with this statement that it may have been an action of detinue (*a*). Another objection is, that it is merely sworn generally that “the cause of action did arise in a material point within the jurisdiction of the said County Court.” It should state in what material point, so that the plaintiff might know upon what ground the defendant relied as bringing the case within the jurisdiction of the County Court, and be enabled to answer it. [*Wightman*, J.—If the cause of action in a material point did arise within the jurisdiction of the County Court, the plaintiff must know that as well as the defendant does.] The affidavit is vague. It would be impossible to indict a party for perjury on such an allegation. It is a conclusion of law which the defendant swears to, and one of a very doubtful kind; *Wood v. Perry* (*b*); he should state the facts, and leave the Court to pronounce whether his conclusion be right. The affidavit should shew the facts upon which the suggestion is to be entered;—a suggestion in this form could not be tried. In *Peterson and Another v. Davis* (*c*), it was held, that the affidavits supporting an application to enter a suggestion under the London County Court Act (10 & 11 Vict. c. lxxi. s. 113) should describe the particulars of the residence of the defendant at the time of the action being brought; and that an affidavit merely stating that the defendant dwelt in the City of London, without giving the particulars of his address, was insufficient.

Ball, in support of the rule. The defendant swears that

(*a*) See *Broadbent v. Ledward*, 11 A. & E. 209; S. C. 3 P. & D. 45; *Hand v. Daniels*, *ante*, p. 420; and also note to Mr. *Udall's edition of the County Courts' Act*, p. 170, 3rd ed., in which the construction to be put upon the

words in the 129th section, “founded on contract,” and “founded on tort,” is discussed.

(*b*) 6 D. & L. 194; S. C. 3 Exch. 442.

(*c*) 6 C. B. 235; S. C. 6 D. & L. 79.

the action is "founded on contract," and that "the debt claimed herein" is "less than 20*l*." That sufficiently shews that the action is brought to recover a debt. As to the other objection, the defendant adopts the language of the act of Parliament, and brings the case distinctly within its terms, which is sufficient to call upon the plaintiff for an answer. There would be no difficulty in indicting a party swearing falsely in such a case. [*Wightman*, J.—Suppose the plaintiff, in answer, had sworn that it did not arise in any material point within the jurisdiction.] Then the suggestion must have been entered, and the plaintiff could traverse and try the fact. [He was then stopped by the Court.]

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WIGHTMAN, J.—It seems to me that the defendant has made out a sufficient case for a suggestion. He says that the action is founded on contract, that the debt claimed is less than 20*l*., and that the cause of action did arise in a material point within the jurisdiction of the County Court. I think that that is sufficient to call upon the plaintiff for an answer. With respect to the difficulty that has been urged of indicting a party swearing falsely in such a case, I will not pronounce any opinion on the point; but I may observe that the same objection might be urged in the case of an affidavit of merits, when it is always a matter of difficulty to say whether the allegation that the defendant has a good defence on the merits is a conclusion of law or of fact only. The rule will therefore be absolute.

Rule absolute.



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MERITON v. COOMBES and Another.

[In the Common Pleas.

Coram *Maule, J., Cresswell, J., and Talfourd, J.*]

The declaration alleged that the defendants broke and entered the plaintiff's dwelling-house, and made a noise, and broke doors of the plaintiff and belonging to the house, &c.; and ejected and expelled the plaintiff and his family from the possession of the house, and kept them so ejected and expelled; and also seized and took goods of the plaintiff in the house, and threw them into the street, &c.

Plea 3. "As to seizing and taking the

goods," that one of the defendants was possessed of the house; and justification by him and the other as his servant, on the ground that the goods were incumbering the house.

Pleas 4 and 5. "As to the several supposed trespasses in and to the said dwelling-house in which, &c., and as to seizing and taking the said goods," liberum tenementum in A. and B. respectively, and justification by defendants as their servants.

Replication to third plea, de injuriâ.

To fourth and fifth pleas, traverse of liberum tenementum.

New assignment: that the action was brought not only for trespasses mentioned in the introductory part of the third, fourth, and fifth pleas, but also for that defendants, at the time when, &c., in the declaration mentioned, ejected and expelled plaintiff and his family, &c.

Held, on special demurrer, that the new assignment was bad; being inapplicable to the third plea, and the trespasses stated in it being already justified by the fourth and fifth pleas.

TRESPASS quare clausum fregit. The declaration stated, that the defendants heretofore, to wit, on the 21st of January, 1850, and on divers days and times, &c., with force and arms broke and entered the dwelling-house of the plaintiff, and made a great disturbance therein and then remained therein making such disturbance for a long time, to wit, &c.; and then forced and damaged divers doors of the plaintiff of and belonging to the said dwelling-house; and then broke and damaged divers locks, staples, and hinges, belonging to the said doors respectively; and also, during the time aforesaid, to wit, on the day and year first aforesaid, with force and arms, &c. ejected, expelled, put out, and removed the plaintiff and his family out of the possession and enjoyment of the said dwelling-house, and kept them so ejected and expelled for a long time, to wit, thence hitherto; and also, during the time aforesaid, to wit, on the day and year first aforesaid, with force and arms, &c., seized and took divers goods of the plaintiff, to wit, &c., then being in the said dwelling-house and of great value, &c., and then with great

force and violence cast and threw the said goods from and out of the said dwelling-house into a certain public street there, and there then left the same, and then and there threw about, damaged and destroyed the said goods. By means of which several premises, the plaintiff was deprived of the use of his said dwelling-house, &c., and other wrongs, &c.

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Third plea. As to seizing and taking the goods in the declaration mentioned, that before and at the time when, &c., the defendant Coombes, was lawfully possessed of the said dwelling-house, and because the said goods were wrongfully in and upon the said dwelling-house incumbering the same and doing damage to the said Coombes, he, of his own right, and the defendant Colls as his servant, seized the goods and removed them from the dwelling-house, &c., *quæ sunt eædem*, &c. Verification.

Fourth plea. As to the several supposed trespasses in and to the said dwelling-house in which, &c., and as to seizing and taking the said goods, that the said dwelling-house was the dwelling-house, soil, and freehold of Edward Marjoribanks and Sir Edmund Antrobus, wherefore the defendants, as their servants, and by their command, broke and entered, &c., and committed the several supposed trespasses in the introductory part of the plea mentioned; and because the goods were wrongfully in and upon the said dwelling-house incumbering the same, &c., the defendants, as the servants of the said E. M. and Sir E. A., seized the said goods and removed them, &c., *quæ sunt eædem*, &c. Verification.

Fifth plea. As to the trespasses justified by the fourth plea, a similar justification as the servants and by the command of Catherine Campbell Preston. Verification.

Replication to the third plea, *de injuriâ*.

To the fourth and fifth pleas, traverse of *liberum tenementum*.

New assignment: that the plaintiff sued out his writ and declared in this action, not only for the said trespasses

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in the introductory parts of the third, fourth, and fifth pleas respectively and in the declaration mentioned, and in those pleas respectively attempted to be justified, but also for that the defendants, at the said time when, &c., in the said declaration in that behalf mentioned, ejected, expelled, put out, and removed the plaintiff and his family from and out of the possession and enjoyment of the said dwelling-house, &c., and kept them so ejected and expelled for the space of time in the said declaration in that behalf mentioned; whereby the plaintiff during all such time lost the use and benefit of his said dwelling-house, and was thereby put to the great inconvenience and expense in the said declaration mentioned, &c., which trespasses above newly assigned are other and different trespasses than the trespasses in the introductory part of the second, third, fourth, and fifth pleas respectively mentioned, and in those pleas respectively attempted to be justified. Verification and prayer of judgment.

Special demurrer to the replications and new assignment, assigning the following, among other, causes: that the replications and new assignment are double; that as the replications in denial of the third, fourth, and fifth pleas answer the whole of those pleas and support the whole of the declaration, it is double and multifarious to new assign other trespasses than those mentioned in, and attempted to be justified by, the pleas; that the new assignment does not shew that the plaintiff brought his action for trespasses not answered by the third, fourth, and fifth pleas, and that it does not sufficiently appear that the supposed trespasses new assigned are not answered by the third, fourth, and fifth pleas; that the third plea does not profess to answer the trespasses new assigned, and the fourth and fifth do answer such trespasses; that if the dwelling-house in which, &c., was the soil and freehold of E. Marjoribanks and Sir E. Antrobus, or of C. C. Preston, the defendants were justified in committing the trespasses new assigned; and that the new assignment did not shew distinctly that the

trespasses therein mentioned were trespasses to which the third, fourth, and fifth pleas have no application, and which they do not answer or justify.

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Corrie, in support of the demurrer. The new assignment is bad. It is clearly inapplicable to the third plea, for that plea is only pleaded to the seizing and taking of the goods. It is also bad as to the fourth and fifth pleas; for the matter new assigned had been already justified by them. "As the object of a new assignment is to correct an error in the plea, and to aver that the defendant has omitted to answer the whole or a part of the true ground of complaint, it can never be necessary to new assign where the defendant in his plea justifies, or attempts to justify, all the trespasses in respect of which the plaintiff proceeds;" 1 *Chit. Plead.* 663, 7th ed. The pleas in this case justify everything in respect of which the plaintiff proceeds, and the new assignment is merely a repetition of the averment that the house was the plaintiff's. [He also referred to *Neurton v. Harland (a)*.]

Gray, contra. That which is justified by the pleas of liberum tenementum is the breaking and entering; and the plaintiff had a right to treat them as pleaded to that merely. As, however, he relies upon the matter of aggravation, viz., the expulsion of himself and his family from the house, he was bound to new assign that; *Taylor v. Cole (b)*. The pleas, however, only say that the house was the soil and freehold of the parties under whom the defendants justify, at the time when they broke and entered, but do not allege that it was the soil and freehold, &c. when the plaintiff was expelled; and it is consistent with the pleadings that the house was at the time of the expulsion the soil and freehold of the plaintiff. [*Maule, J.*—The declaration alleges the expulsion to have taken place "during the time aforesaid."

(a) 1 M. & G. 644; S. C. 1 Scott, N. R. 474; 7 Moore, 574.

(b) 3 T. R. 292; S. C. in error, 1 H. Bl. 555.

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It points to the same time as the breaking and entering.] The time is laid under a videlicet. [*Talfourd, J.*—The third plea justifies taking the goods only; how is the new assignment applicable to that?] It is admitted that it is inapplicable to the third plea; but so much of it as refers to that plea may be treated as surplusage. [*Maule, J.*—Would a declaration in the terms of this new assignment be good, there being no averment of vi et armis?] Yes, except on special demurrer; the word “ejected” would be sufficient to support such a declaration on general demurrer (a). [He referred, in the course of the argument, to 1 *Smith’s Lead. Ca.* 59, 60.]

Corrie, in reply.

MAULE, J.—In this case it appears to me that the new assignment is bad. The declaration complains that the defendant, on the 21st of January, 1850, and on divers other days, &c., with force and arms, &c., broke and entered into the plaintiff’s dwelling-house, and made a noise and disturbance, and broke and damaged divers doors, &c. of the plaintiff of and belonging to the said dwelling-house, and broke divers locks, &c. belonging to the said doors, &c., and also during the time aforesaid with force and arms, &c., ejected, expelled, put out, and removed the plaintiff and his family, &c. from and out of the possession of the said dwelling-house, and kept them so ejected and expelled, &c. Then there are two pleas of liberum tenementum which commence in this way: “And for a further plea as to the several supposed trespasses in and to the dwelling-house in which,” &c. Those pleas are pleaded to all the trespasses “in and to the dwelling-house.” Then comes a replication denying the liberum tenementum, and further new assigning that the action had been brought, not only for the trespasses

(a) The 4 Ann. c. 16, s. 1, shall be taken” “of or for the enacts, among other things, omission of vi et armis,” except “that no advantage or exception upon special demurrer.

mentioned in the introductory part of the pleas, but also for that the defendants, at the time when, &c., ejected, expelled, put out, and removed the plaintiff and his family from the possession of the dwelling-house, and kept him so ejected, expelled, &c. The new assignment, then, is, not that the defendant committed an assault on the plaintiff, but that the defendant ejected and removed the plaintiff and his family from the possession of the dwelling-house. That removing from the possession of the dwelling-house, if an injury, is a trespass to the dwelling-house within the meaning of the plea. All the trespasses to the dwelling-house are mentioned in the introductory part of the plea, and justified by it; and as the trespass mentioned in the new assignment is a trespass to the dwelling-house, it is already answered by the plea. The new assignment is therefore bad.

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CRESSWELL, J., and TALFOURD, J., concurred.

Judgment for the Defendants.



The SOUTH STAFFORDSHIRE RAILWAY COMPANY v. SMITH.

June 10.

[In the Exchequer of Pleas.

Coram *Pollock, C. B., Alderson, B., Rolfe, B., and Platt, B.*]

DEBT for calls.

Plea in abatement; that before and at the time, &c. the defendant was, and still is, one of the attorneys of the Queen's Bench, and during all the time aforesaid hath

To a declaration in debt, the defendant pleaded that he was an attorney of the Court of Queen's Bench.

without averring that he was not an attorney of this Court. The plaintiff replied that defendant was an attorney of this Court, concluding with a verification by the record, and prayer of inspection of the record. Upon motion for judgment, *Held*, that the plaintiff was entitled to judgment, although there was no issue joined upon the pleadings.

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prosecuted, &c. divers suits, &c. in the last mentioned Court for divers persons, as their attorney. The plea then proceeded to allege, in the usual terms, the privilege of attorneys of being sued only in the Court of which they are attorneys, but did not contain any averment that the defendant was not an attorney of this Court. The plea concluded with a verification and prayer of judgment.

Replication, that notwithstanding, &c. the defendant was, and still is, one of the attorneys of the Court of Exchequer, "as by the record of the inrolment of the attorneys of the said Court" "fully appears." Verification by the said record, and prayer of inspection. "And because the Court here is not yet advised what judgment to give in the premises, a day is given to the said parties here until the 10th day of June in this same Term to hear the judgment of the Court here. Thereupon," &c.

Burnie, on behalf of the plaintiff, moved for judgment upon production of the roll of attorneys with the defendant's signature thereon,—citing *Jackson v. Wickes* (a).

Pigott, contra. The plaintiff is not entitled to judgment, because there is no issue joined between the parties,—there being no allegation on one side which is denied by the other. The old form of plea (b) alleged that the defendant was not an attorney of the Court in which he was sued; and upon a traverse of that negative allegation, an issue was joined which could be tried by production of the record. But that negative averment has been held to be unnecessary (c). Here, the replication confesses and avoids, but does not traverse, the allegation on the other side. It states new matter, which the defendant ought to have an opportunity either of denying by rejoinder, or of demurring to.

(a) 7 Taunt. 30.

& L. 13.

(b) See form, *Graham v. Ingleby*, 2 Exch. 442; S. C. 6 D.

(c) See *Percival v. Cooke*, 5 M. & W. 293; S. C. 7 Dowl. 500.

Burnie, in reply. The present form of plea is given in 3 *Chit. Plead.* 12, 7th ed., and is taken from *Lilly's Entries*. *Jackson v. Wickes* (a) was an action of debt on a bail recognizance. The defendant pleaded, that since the judgment against the principal, no ca. sa. had been sued out and executed against him. The plaintiff replied, that since the judgment he had sued out a ca. sa., which he set out, "as by the said writ of ca. sa., and return thereof, duly returned and filed, would appear; and that he was ready to verify by the record," &c. The defendant demurred on the ground taken here, viz., that no issue was joined; but the Court held the replication good, because, as the record was of the same Court, the defendant would have, by the inspection of the record, all the benefit which any rejoinder could give him. [*Alderson*, B.—How is the identity of the defendant to be proved?] The plea being in abatement, there is an affidavit verifying it. [*Platt*, B.—All that *Jackson v. Wickes* decided was, that the replication was good on demurrer. The change of form in the plea is noticed in *Walford v. Fleetwood* (b).]

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POLLOCK, C. B.—I think there must be judgment for the plaintiff.

ALDERSON, B.—I am of the same opinion. There is a case in *Salkeld* (c), in which a plea like the present was held good. Then comes the case of *Jackson v. Wickes*, in which the plaintiff, instead of taking issue by adding a similiter to the plea, set out the record and prayed judgment in the replication, and the Court held it good; so that the tendency of the decisions seems to have been to cut down all unnecessary form, and I think we should follow them.

(a) 7 Taunt. 30.

(c) *Kirkham v. Wheely*, 2 Salk.

(b) 14 M. & W. 449; S. C. 543.

3 D. & L. 65.

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ROLFE, B., concurred.

PLATT, B.—I think this case is governed by *Jackson v. Wickes* (a). It appears, on inspection, that the plaintiff's replication is true, and we ought to give judgment accordingly.

Judgment for the Plaintiff of Quod Respondeat Ouster.

(a) 7 Taunt. 30.

June 10.

HILL v. FLETCHER.

[In the Exchequer of Pleas.

Coram Pollock, C. B., Alderson, B., Rolfe, B., and
Platt, B.]

A Judge's order, directing "that the plaintiff do forthwith give security for costs, no stay of proceedings in the meantime, the plaintiff's attorney hereby undertaking to find such security," does not bind the plaintiff or his attorney to give security, unless he proceed with the action.

A RULE was obtained last Term, calling on the attorney for the plaintiff to shew cause why an attachment should not issue against him for not finding security for costs, pursuant to his undertaking.

It appeared from the affidavits that after issue joined, and before notice of trial, the attorneys of both parties attended before *Coleridge, J.*, who ordered, "that the plaintiff do forthwith give security herein for costs to the satisfaction of one of the Masters,—no stay of proceedings in the mean time,—the plaintiff's attorney hereby undertaking to find such security." This order was afterwards made a rule of Court.

A rule, therefore, for an attachment against the attorney for not giving security, was discharged, where it appeared that no step had been taken in the action.

No further proceedings were taken on either side subsequently to this order, and the plaintiff's attorney did not give any security for costs.

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Lush shewed cause. 'There has been no contempt of Court. The plaintiff was not bound to give security for costs unless he proceeded with the action. The effect of the order is to stay proceedings until security is given by the plaintiff; but unless he proceeds he cannot be compelled to give security. The Court never appoint any fixed time within which a plaintiff must give security. In *Kelly v. Brown* (a), the Court refused to introduce in a rule for security for costs the term, that the plaintiff should be at liberty to sign judgment as in case of a nonsuit, if the security should not be given within fourteen days.

Maynard, in support of the rule. The question is, what is the meaning of the order. It directs security to be given "forthwith," and adds, that there is to be "no stay of proceedings in the mean time." The defendant, under these circumstances, has a right to security without waiting for the plaintiff to proceed in the action. [*Alderson*, B.—The reasonable construction is, "if the plaintiff goes on, then he must give security."]

POLLOCK, C. B.—This rule must be discharged. Giving all weight to Mr. *Maynard's* argument, I am still of opinion that the proper construction of this order is, "If I go on, I undertake to give security." 'This view is supported by the case of *Kelly v. Brown*, where the Court refused to add any term, except a stay of proceedings, unless the plaintiff gave security.

ALDERSON, B.—The whole difficulty arises from the use of the word "forthwith;" but I think that only applies if the plaintiff proceeds with the action.

(a) 5 Dowl. 264.

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ROLFE, B.—I had at first some doubt, owing to the peculiar form of the order, but I agree with the rest of the Court in the construction they put upon it. The giving security is the price the attorney would pay for proceeding.

PLATT, B., concurred.

Rule discharged.

June 11.

REGINA v. THE JUSTICES OF DEVONSHIRE.

[*Bail Court. Coram Wightman, J.*]

The proper mode of removing an order of sessions into this Court, in order to enforce it, under the 12 & 13 Vict. c. 45, s. 18, is by writ of certiorari.

PASHLEY moved to remove an order of justices in sessions of the county of Devon, ordering payment of the costs of an appeal, into this Court, for the purpose of being enforced, as a rule of this Court, under the 12 & 13 Vict. c. 45, s. 18. The removal may be effected either by writ of certiorari or order (*a*).

WIGHTMAN, J.—You had better have a writ of certiorari. I order it to be removed; and the proper and formal mode of doing so is by writ of certiorari.

Writ granted.

(*a*) See *Reg. v. Gamble*, 16 M. & W. 384, 395.

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BIRCH and Another v. LOWNDES.

June 11.

[*Bail Court. Coram Wightman, J.*]

THIS was a rule for judgment as in case of a nonsuit.

The affidavit in support of the rule stated, that the venue was laid in Middlesex, that issue was joined on the 30th of May, 1849, and notice of trial given for the sittings after Trinity Term in the same year; and that the plaintiffs had not proceeded to trial or countermanded their notice.

The affidavit in opposition to the rule was made by one of the plaintiffs, and stated the following facts. The action was commenced against the defendant as a member of the provisional committee and a contributory to the London, Birmingham, and Buckinghamshire Railway Company, in respect of a claim by the plaintiffs against the company, or the provisional committee thereof, for professional services performed by them.

The cause had been made a special jury cause at the instance of the defendant, and, in consequence thereof, was not taken at the sittings after Trinity Term, 1849, but was made a remanet to the sittings after Michaelmas Term in the same year, and subsequently, to the sittings after Hilary Term, 1850. In November, 1849, the defendant presented a petition to the Court of Chancery, praying that the affairs of the company might be wound up, under the provisions of the Joint Stock Companies Winding-up Act, 1848. In the same month, a person of the name of Waddy presented a similar petition, upon which, on the 23rd of the month, the Vice Chancellor made an order for dissolving and winding up the said company. On the 4th of December, the cause being then ready for trial, the defendant took out a summons, calling upon the plaintiffs to shew cause why all further proceedings should not

The Court will not give judgment as in case of a nonsuit in an action against a member of a provisional committee of a joint stock company, where proceedings are pending in the Court of Chancery for the winding up of the company, under the 11 & 12 Vict. c. 45; unless it appears that the plaintiff has been guilty of neglect in going before the Master and proving his claim.

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be stayed until after the plaintiffs should have proved their debt before the Master, under the order for dissolving and winding up the company; but as no official assignee had at that time been appointed, the defendant abandoned the summons. Before the sittings after Hilary Term, 1850, (the affidavit did not state the date more precisely), an official manager was appointed. On the 1st of February, notice was given to the defendant that the plaintiffs had, in consequence of the appointment of an official manager, withdrawn the record, and would carry in their claim before the Master. On the 10th of April, an affidavit was accordingly made by one of the plaintiffs of the truth of the claim for which the action was brought, and the same was carried in before the Master, and due notice thereof was given to the official manager. No further proceedings had been taken, up to the present time, either by the petitioner or any other person in relation to the said order, or to the winding up of the affairs of the said company.

Montague Smith shewed cause. This rule must be discharged. The plaintiffs committed no default till the sittings after Hilary Term in the present year; and before that time a petition had been presented to the Court of Chancery, an order made for dissolving and winding up the affairs of the company, and an official manager appointed pursuant to the provisions of the 11 & 12 Vict. c. 45. By the 73rd section of that statute it is enacted, "that after the first appointment of an official manager no creditor or other person shall, except so far as the Master shall permit, have power to commence or to proceed with any action against the official manager or against the company, or any other person representing the same, or who is sued as a contributory thereof, until after proof, or exhibiting or making such proof as he may be able, of his debt or demand before the Master, as hereinafter mentioned;" and a Judge, on summons, may order proceedings to be stayed accordingly. After the appointment, therefore, of the official

manager, which must have taken place some time in January last, the plaintiffs could not proceed to try the action at the sittings after Hilary Term, until they had first proved their debt or demand before the Master. [*Wightman*, J.—What was to prevent them from going in and proving their debt before the Master?] They could not do so till the official manager was appointed, and it is not shewn that a reasonable time for their doing so had elapsed after his appointment and before the time of their withdrawing the record. Here the defendant himself was a petitioner for the order which has stayed the plaintiff's proceedings, and he cannot afterwards ask for judgment as in case of a nonsuit, in consequence of a delay occasioned by himself. It is like the case of a defendant who has taken proceedings in Chancery against the plaintiff, and thereby rendered it unnecessary for him to proceed to trial; *Partridge v. Salter* (a).

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Manisty, in support of the rule. There is no analogy between the case last cited and the present one. There the order in Chancery was not made on the petition of the defendant, but of another person. The 73rd section is not compulsory upon the plaintiffs to stay proceedings in the action, but only requires that they should first prove their debt before the Master. [*Wightman*, J.—When was the official manager appointed?] Some time in January; but it does not appear when (b). [*Wightman*, J.—He might only have been appointed on the 31st.] If it be sufficient to shew, in answer to a rule of this kind, that an order under this act has been made and an official manager appointed, without shewing that the plaintiffs have not been guilty of delay in going in and proving their claim before the Master, it will be difficult in any of these cases

(a) 5 Dowl. 68; See Anon. 1 Cbit. 280, n.

(b) *Montague Smith* stated that the appointment was made, as it was believed, some time in the

latter end of January, but that the official manager, when applied to on the subject, refused to say when he was appointed.

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to procure a judgment of nonsuit, as a plaintiff, who feels he has no good cause of action, may refuse to prove the claim before the Master.

Cur. adv. vult.

WIGHTMAN, J.—The difficulty imposed upon the Court by this section is, that it may be said that if the present answer be good, it may be set up in every case where similar proceedings have been taken, and the plaintiff does not choose to go in at any time, being unable to prove any claim before the Master.

In cases of this sort, however, everything will turn upon the dates. Unfortunately it does not appear here when the official manager was appointed; and it may be that it was so short a time before the record was withdrawn that it might be unreasonable to expect the plaintiff to go before the Master on so brief a notice.

Therefore there is no ground for saying, that in discharging this rule I am deciding that a party need not go before the Master, where it is shewn that he has had reasonable time to do so. A party cannot, by refusing to prove his claim, prevent the defendant from moving for judgment as in case of a nonsuit. At present it does not appear that there was any unreasonable delay on the part of the plaintiff. It becomes then, I think, the ordinary case in which the plaintiff shews that he had a reasonable excuse for not proceeding to trial. The rule must, therefore, be discharged. If there be another default, there is no reason that there should not be another application. If it had appeared that the official manager had been appointed early in January, I think the plaintiff would have been bound to go before the Master and prove his claim.

Rule discharged.

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In re a Complaint or Suit in the County Court of SUFFOLK,

June 11.

Between

DECIMUS SEWELL,
and
WILLIAM JONES.

[*Bail Court. Coram Wightman, J.*]

THIS was a rule for a prohibition to the Judge of the County Court of Suffolk, to prohibit him from proceeding further in the above plaint.

A summons had been served to answer a plaint in the County Court in the nature of an action on the case for an injury to the plaintiff's reversionary interest in land. The injury complained of, as set forth in the particulars, was the removal of a boundary fence between the lands of the plaintiff and the defendant, cutting down trees, &c., and the erection of a new fence, in such a manner as to make it appear that a certain portion of the plaintiff's land belonged to the defendant. *Held*, that the defendant,

The facts as stated in the affidavits, as far as they are material to the present case, were as follows. The plaintiff and the defendant were owners of adjoining premises, situate at Sudbury, in the county of Suffolk, the gardens of which were only divided by a slight fence, which was the property of the defendant. In July, 1847, the fence having got out of repair, the defendant proceeded to pull it down and erect a new one,—in the same place, as he and his witnesses swore, as the old fence, excepting that in one part, to make it straight, he cut off about six inches of his own land ;—but as the plaintiff and his witnesses swore, more than two feet on the plaintiff's side of the hedge, so as to include that quantity of the plaintiff's land, and some currant bushes, which each party claimed as growing on his land, and a bullace tree, which was also claimed by the plaintiff. A summons, issued out of the County Court of Suffolk, dated the 9th of May, in the present year, was served upon the defendant, calling upon him to answer the plaintiff “in an action of tort for damage and

upon shewing that the title to land was bonà fide in dispute, was entitled to a prohibition, and that he was not bound to wait till the County Court had proceeded to hear the case.

The question which the Court in such a case has to inquire into, is not whether the title set up by the defendant is good, but whether there exists a bonâ fide dispute as to the title.

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injury to plaintiff's property, situate," &c., "and for the destruction of the same or the deterioration thereof, and of plaintiff's reversionary estate and interest therein, &c." The summons referred to particulars annexed to it, which stated an injury to plaintiff's reversionary interest, by cutting down trees and destroying a boundary fence in a garden of the plaintiff's, then in the occupation of L. S., as his tenant; subverting the soil, and erecting a new fence, so as wrongfully to make it appear, and in order that it might falsely and deceitfully appear, that a portion of the garden of the plaintiff did not belong to the plaintiff, but belonged to, and formed a portion of, the defendant's garden next adjoining (a).

The present rule was obtained on the 23rd of May; against which,

Hawkins shewed cause. This application is grounded on the 58th section of the 9 & 10 Vict. c. 95, (the County Courts' Act), which enacts, "that the Court" (the County Court) "shall not have cognizance of any action" "in which the title to any corporeal or incorporeal hereditaments" "shall be in question." A mere allegation that the title is in question is not sufficient. In *Lilley v. Harvey* (b), *Wightman*, J., in giving judgment, says: "Where the question is not raised upon the pleadings, but is merely suggested by the defendant, the Judge must inquire into the circumstances before he can be satisfied that title does come in question." The present application is therefore premature; for no inquiry has, as yet, taken place before the County Court Judge. [*Wightman*, J.—Suppose there is no doubt that the title will come into question upon the trial, must not the prohibition go whether the County Court Judge has been

(a) The particulars were of considerable length, and were drawn up with the same particularity, and much in the same language

and form, as a declaration upon the case for injury to a reversion.

(b) 5 D. & L. 648, 654.

applied to or not upon the subject?] The plaintiff's affidavits, however, shew that the title is not in dispute, and that the only question is, whether the fence has been put up in its proper place. The Legislature intended that the County Court Judge should, in the first instance, inquire into the facts, and see whether or not he has jurisdiction to hear the case. If, indeed, he decides wrongly, this Court will control his decision; but this Court will not interfere until he has inquired into the facts. [*Wightman*, J.—I shall presume that if this case went to the County Court Judge, he would decide as I shall do.] At any rate, the affidavits in the present case are insufficient to support the rule; for it is not enough to state that the title is in question merely because the defendant claims to be entitled to the land. The title should be set out, so that the Court may see whether he really is entitled to the premises, or whether the title that is set up is a mere colourable title.

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Naylor, in support of the rule, was not called upon.

WIGHTMAN, J.—In this case an action was brought in the County Court for damages for an injury to the plaintiff's reversionary interest. The plaint and particulars state:—(his Lordship here read the plaint and particulars). Now, this is very much in the ordinary form of an action on the case for an injury to a reversionary interest. This cause of action is entertained by the County Court, and a summons is issued to the defendant, calling upon him to answer it. The defendant then comes to this Court for a prohibition, on the ground that the title to the land is in question, and that the County Court has, therefore, no jurisdiction to hear the plaint.

It is said, however, that this application is made too early, and that the defendant should have waited until the plaint came on for hearing in the County Court,

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and then have made the objection to the jurisdiction, which the County Court Judge would probably have entertained, and refrained from trying the cause. If, however, the Judge had decided otherwise, an application on the same grounds as the present must have been made; and yet, the defendant might not have been able to make it on account of the Long Vacation. I therefore think he may come now to the Court for a prohibition, upon shewing that the title is bonâ fide in question.

Mr. *Hawkins* has urged that the defendant ought to set out the title which he alleges will come in question upon the trial, so that the Court may see that he really has title. That would make the question depend rather upon the issue which remains to be tried between the parties, than on whether the title to land is bonâ fide in dispute.

The bona fides alluded to in some of the cases, is as to whether the defendant's own acts do not shew that he has no shadow of title or pretence for setting up the question of title; not as to whether the title is not one which can be controverted. It seems to me, that taking the affidavits on both sides, the question in dispute is one of title, or none at all. [His Lordship here remarked upon the facts of the case.]

I really think this is one of the strongest cases which have come before me on similar grounds, since such applications were first made; and I am at a loss to know what case can come within the section, prohibiting the Court from having jurisdiction in questions of title, if this does not.

Rule absolute (a).

(a) The plaintiff to declare in prohibition within a fortnight.

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In re an Arbitration
Between RALPH LINDSAY
and
THE DIRECT LONDON AND PORTSMOUTH RAIL-
WAY COMPANY.

May 31.
June 12.

[*Bail Court. Coram Wightman, J.*]

A RULE had been obtained in last Easter Term, calling upon the Direct London and Portsmouth Railway Company to shew cause why they should not pay to Ralph Lindsay the sums of 1075*l.* and 105*l.*, pursuant to the rule of Court made herein, and the award made between the parties.

The affidavits in support of the rule stated the following facts. On the 15th of June, 1849, a deed of submission was entered into between Mr. Ralph Lindsay and the Direct London and Portsmouth Railway Company. The deed recited, that the company were, by their acts, authorized to take certain lands in the parish of Epsom, in the county of Surrey, and, amongst others, certain lands to which R. Lindsay was, or claimed to be, entitled for an

By a deed of submission made between L. and a railway company, after reciting that the company were authorized to take certain lands, of which L. was or claimed to be owner, that they had given him notice that they required his lands, and that it was agreed that they should become the purchasers thereof in the

mode hereinafter pointed out;—it was covenanted that it should be referred to W. T. to determine the value to be paid for the lands; that the purchase-money should be paid within three days after the making of the award; and “thereupon” L. should execute a conveyance; “subject” “to the payment of the amount of such purchase money into the Court of Chancery under the circumstances and in the manner provided for by the Lands Clauses’ Consolidation Act, 1845.” The arbitrator found the value of the land at a certain sum, and directed it to be paid “within three days after,” &c., “subject,” &c., (following the words of the submission). The submission having been made a rule of Court, and a rule having been obtained, calling upon the company to shew cause why they should not pay the sum of money, (under 1 & 2 Vict. c. 110, s. 18):

Held, that assuming even that the arbitrator had exceeded his jurisdiction in ordering the money to be paid, the rest of the award was good (*a*); and that, as the award ascertained the amount of the purchase-money which the company by their deed of submission had agreed to pay, there was sufficient to enable the Court to make an order on them to pay it.

Held also, that the payment of the money and the execution of the conveyance by L. were not dependent conditions, but that the payment was to precede the conveyance; and that it was, therefore, no answer to the present rule that a conveyance had not been tendered.

Held also, that it was no objection that it was not shewn that the company had taken possession of the land.

(*a*) See *Miller and Another v. De Burgh*, ante, p. 177.

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estate of inheritance in fee simple; and certain other lands upon which he claimed to be entitled to a rent charge or annuity of 14*l.* per annum. It further recited, that the company had given notice to Lindsay that they should require these lands; and that it had been arranged and agreed between the company and Lindsay that the company should become the purchasers of the lands, and that the purchase of the same should be carried into effect in the manner thereafter mentioned. The deed then witnessed that Lindsay and the company covenanted and agreed with each other in manner following: First, that W. T., of, &c., “shall be the single arbitrator to whom it shall be referred, and who shall accordingly, by his award, determine what consideration or other sum or sums of money is or are the value, and shall be paid by the said company for the absolute purchase by the said company of the said piece or parcel of land,” &c., “and also for the absolute purchase by the said company of the said rent charge,” &c. Thirdly, that the “purchase-money shall be paid by the said company to the said Ralph Lindsay, his heirs or assigns, within three days from the date of the said award; and thereupon the said Ralph Lindsay, his heirs or assigns, shall execute, or procure to be executed, to the said company, their successors and assigns, a valid conveyance and assurance of the said piece or parcel of land,” &c., “and also of the aforesaid rent charge of 14*l.*,” &c.; “subject nevertheless to the payment of the amount of such purchase-money into the Court of Chancery under the circumstances and in the manner provided for by the Lands’ Clauses Consolidation Act, 1845.” “Fourthly, that if from any cause, other than the wilful neglect or default of the said Ralph Lindsay, his heirs,” &c., “the said purchase-money shall not, before the expiration of one calendar month from the date of the award, be either paid to the said Ralph Lindsay, his heirs or assigns, or paid into the Court of Chancery, then and in such case interest after the rate of 5*l.* per cent. per annum shall be paid to the parties entitled to such purchase-money,

to be computed upon the amount thereof from the expiration of such period of one month." "And, fifthly, that the company shall pay all the vendor's costs, charges, and expenses whatsoever relative, or in any manner incidental, to the purchase and conveyance of the said piece or parcel of land, and of the said rent charge, and incidental to these presents and the arbitration and award to be made thereunder, according to the provisions of the 82nd section of the Lands' Clauses Consolidation Act." There was also a clause that the deed might be made a rule of Court (a).

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The arbitrator made his award on the 31st of July, 1849, by which, after reciting the deed of submission, and that he had taken upon himself the burthen of the arbitration, and had heard the allegations and evidence of the parties, he found, that "the sum of 1075*£*, and no more, is the value, and shall be paid by the Direct London and Portsmouth Railway Company for the absolute purchase by the said company of the piece or parcel of land," &c., "and that the sum of 105*£*, and no more, is the value, and shall be paid by the said Direct London and Portsmouth Railway Company for the absolute purchase by the said company of the rent charge or sum of 14*£*," &c. "And I do hereby further award," &c. "that the said purchase-money, or sum of 1075*£*, shall, within three days from the date of this my award, be paid by the said company to the said Ralph Lindsay," &c., "and that thereupon the said Ralph Lindsay, his heirs," &c., "shall execute, or procure to be executed, to the said company, their successors," &c., "a valid conveyance and assurance of the said piece or parcel of land," &c. There was a similar direction as to the sum of 105*£* for the rent charge. The arbitrator then went on to "award," &c. "that all the vendor's costs, charges, and expenses whatsoever relative to, or in any manner incidental to, the purchase and conveyance of the said piece or parcel

(a) The deed contained some other clauses, not material, however, to the present question.

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of land," &c., "and of the aforesaid rent charge," &c., "shall, according to the provisions of the 82nd section of the Lands' Clauses Consolidation Act, be paid by the said Direct London and Portsmouth Railway Company;" and "that the costs of the arbitration and reference shall be paid by the said Direct London and Portsmouth Railway Company on or before the 31st day of August next; and that the sum of 34*l.*, the costs of this my award, shall be paid forthwith by the said Direct London and Portsmouth Railway Company" (*a*).

The deed of submission was made a rule of Court on the 17th of January, 1850. Service of the rule and demand was made, with the usual formalities, upon the secretary of the company on the 26th of March, 1850. The present rule was obtained on the 22nd of April last.

In opposition to the present rule, an affidavit was made by the managing clerk of the attorneys of the company, stating that Lindsay had delivered to the company an abstract of his title to the lands, which had been laid before counsel, who had advised that the title so disclosed was insufficient and unmarketable. The deponent stated his belief that the title was insufficient and unmarketable; and the affidavit went on to state, "that in consequence thereof it will be necessary to make divers requisitions and demands upon the said Ralph Lindsay in respect of or in relation to the said title; and that in the event of the said Ralph Lindsay being unable to reply to such requisitions and demands to the satisfaction of the said company, they the said company are, by the Lands' Clauses Consolidation Act, 1845, which is incorporated with the act incorporating the said company, authorized and empowered to pay the purchase-money awarded for the said lands into the High Court of Chancery, pursuant to the said Lands' Clauses Consolidation Act, 1845."

(*a*) The award contained other provisions, respecting which, however, no question arose.

Bramwell and *J. Burchell* shewed cause. All that the arbitrator in this case had power to do was, to ascertain the value of the land. There is, therefore, an excess of authority in his ordering the company to pay these sums. Even if that portion of the award could be separated from the rest, and leave a good award as to the price of the land standing, this rule cannot be supported, as the award will then contain no direction to pay the sums of money; and many cases shew that, unless the award directs the money to be paid, an attachment will not be granted (*a*). And this proceeding is in the nature of an attachment.

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Another objection to this application is, that the execution by Lindsay of a deed of conveyance of the lands was clearly a condition precedent to the payment of the money; 1 *Wms. Saund.* 320 *e*, note (5), 6th ed.; and it is not shewn that such a deed has been executed, or that Lindsay was ready and willing to execute it if it had been tendered; *Poole v. Hill* (*b*). Even if the Court entertain a doubt as to the conditions being independent, they will not interfere, but will leave the parties to their remedy by action.

A further objection is, that as it does not appear that any land has been taken, Lindsay is entitled only to damages for the breach of the agreement to purchase; *Laird v. Pim* (*c*); and not to the whole amount of the purchase-money (*d*). [They also referred to *Chanter v. Leese* (*e*); *De Medina v. Norman* (*f*); and *Graham v. Darcey* (*g*).]

Watson, in support of the rule. Conceding, for the

(*a*) See them collected in *Watson on Awards*, p. 310, *et seq.*, 3rd ed.

(*b*) 6 M. & W. 835.

(*c*) 7 M. & W. 474; S. C. 8 Dowl. 860.

(*d*) They also objected that the title disclosed by Lindsay was defective, and that the costs of the arbitration and award were not ascertained by the award, or taxed, or asked for by the present

rule, nor had they been abandoned or released; (see per *Parke, B.*, in *Tattersall v. Parkinson*, 2 Exch. 342); but as these objections were not noticed in the judgment of the Court, the argument upon them is omitted.

(*e*) 4 M. & W. 295.

(*f*) 9 M. & W. 820.

(*g*) 6 C. B. 537; S. C. 6 D. & L. 385.

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purpose of argument, that the arbitrator had no authority to order the payment of these sums, it was expressly agreed in the deed of submission, that the sum found by him as the value of the lands should be paid by the company within three days after the award made. That submission is made a rule of Court, and therefore it is the same as if that agreement had been embodied by consent of the parties in a rule of Court. [*Wightman, J.*—Where, as in the present case, the parties by their submission agree to submit the question of price only to the arbitrator, and the submission contains a clause that the money shall be paid at a fixed period: would that clause become a part of the rule of Court, and be capable of being enforced by attachment? Is not the attachment for disobedience of the *award*?] No; it is for contempt of the rule of Court. [*Wightman, J.*—The stat. 9 & 10 Wm. 3, c. 15, s. 1, says, that where the parties to a reference agree that the submission shall be made a rule of Court, upon affidavit of the agreement having been entered into, “a rule shall thereupon be made by the said Court, that the parties shall submit to and finally be concluded by the arbitration or umpirage,” &c., “and in case of disobedience to such arbitration,” &c., “the party neglecting or refusing,” &c., “shall be subject to all the penalties of contemning a rule of Court.” As far as this award is concerned, when, do you contend, did the disobedience take place, so as to entitle the party to an attachment?] As soon as the money was demanded under the rule of Court. [*Wightman, J.*—But the submission says it is to be paid within three days.] Probably there would be no contempt until after the expiration of the three days. [*Wightman, J.*—Then it would not be for the disobedience of the award alone that you proceed.] The award and submission must be coupled together. In the present instance, however, the application is not for an attachment, as in *Edgell v. Dallimore (a)*. All that the

(a) 3 Bing. 634; S. C. 11 Moore, 541.

Court require to see in an application of this kind is that the sum is clearly due, in order to enable them to call upon the defendant to shew cause why he should not be ordered to pay the money (*a*). In *Baker v. Cotterill* (*b*), it was objected, in an application like the present, that the award only found a sum due, but did not order it to be paid; but the Court notwithstanding made the rule absolute.

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As to the objection that the agreement to pay, and the agreement to convey, are conditions dependent, it is submitted that they are clearly not so, within the rule laid down in the case of *Pordage v. Cole* (*c*). The test is, who is to prepare the conveyance; and it is clear that Lindsay might maintain an action for the price without averring a tender of a conveyance, or even a readiness and willingness to convey; *Wilks v. Smith* (*d*). The terms of the deed of submission, and the provisions of the Lands' Clauses Consolidation Act, lead to the same conclusion.

To the remaining objection there is the answer, that here the Lands' Clauses Consolidation Act, under which this reference virtually takes place, authorizes the company, on giving the notice and submitting the matter to arbitration, to take the lands, whenever they please, into their own possession; and therefore the cases cited as to the amount to be recovered, being actions for damages only, do not apply.

Cur. adv. vult.

WIGHTMAN, J.—This was a rule, calling upon the Direct London and Portsmouth Railway Company to shew cause why they should not pay the sums of 1075*l.*, and 105*l.*, pursuant to a submission to arbitration made a rule of Court, and the award made under that submission.

(*a*) See *Jones v. Williams*, 11 A. & E. 175; S. C. 4 P. & D. 217.

(*c*) 1 Wms. Saund. 319 *l.*, 6th ed.

(*b*) Bail Court, Trin. Term, 1849. This case will be reported in 7 D. & L.

(*d*) 2 Dowl. 215, N. S.; S. C. 10 M. & W. 355.

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It appears that by a deed of submission made between Lindsay and the railway company, and which has been since made a rule of Court, pursuant to a clause in it to that effect, after reciting that the company were by their acts authorized to take, amongst other lands, those of which Mr. Lindsay was or claimed to be owner, for the purposes of their acts, and that they had given notice to Lindsay that they required these lands, and that it was agreed they should become the purchasers in the mode thereafter pointed out; it was covenanted and agreed that it should be referred to an arbitrator named, to "determine what consideration or other sum or sums of money was the value, and should be paid by the said company for the absolute purchase by the said company of the said field or parcel of land." And it was further agreed, "that the purchase-money should be paid by the said company within three days from the date of the said award; and thereupon the said Ralph Lindsay, his heirs," &c. "should execute or procure to be executed to the said company, their successors or assigns, a valid conveyance and assurance of the said piece or parcel of land," &c.

The arbitrator, by his award, found the value of the lands to be the sums above mentioned; and also awarded and directed, that they should be paid by the company to Lindsay within three days from the date of his award, and that thereupon Lindsay should execute to the company a valid conveyance of the same.

Upon shewing cause against the present rule, it was contended that the award was bad, at least as far as regarded the direction to pay those sums of money, since there was no power to that effect conferred upon the arbitrator by the deed of submission. I do not consider it material for the purposes of this application to consider whether that is so or not. In any view of the case, the award ascertains the amount of the purchase-money which the company, by the deed of submission, have agreed to pay to Lindsay within three days from the date of the award,

and, therefore, there is sufficient to enable the Court to order the company to pay the money.

Another objection which has been raised is, that by the terms of the submission the money is to be "paid by the company within three days from the date of the award; and that thereupon" Lindsay is to execute a valid conveyance of the premises: and it is objected for the company, that the payment of the money is not a condition precedent to the execution of the conveyance, but that the execution of the conveyance was a concurrent condition with the payment of the purchase-money. *Laird v. Pim* (a), and *Pordage v. Cole* (b), were cited. Whether a condition is a precedent condition or not, must depend on the language in each particular case. In note (4) to the case of *Pordage v. Cole*, the rule is thus laid down: "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or *may* happen, *before* the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent: and so it is where *no time* is fixed for performance of that, which is the consideration of the money or other act." Applying that rule to the present case, as the company by the deed of submission agreed to pay the purchase-money, to be ascertained by the arbitrator, within three days after the award was published, and as it was only "thereupon" that the conveyance was to be executed, it is clear that the payment of the money was to precede the conveyance of the estate by Lindsay, and that the company did not intend to make the execution of a conveyance of the estate by him a concurrent condition.

But it has been said, that even if that were so, the com-

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(a) 7 M. & W. 474; S. C. 8 Dowl. 860.

(b) 1 Wms. Saund. 319 l, 320 b, 6th ed.

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pany are not bound, according to the case of *Laird v. Pim*(a), to pay the whole amount of the purchase-money found by the arbitrator, but only such damages as Lindsay has actually sustained by their breach of the contract. Whatever might be the case if an action for damages was brought, I am clearly of opinion that upon this rule the claimant is entitled to the whole amount found by the arbitrator, and which by the submission the company was bound to pay. The case of *Laird v. Pim* is in that respect inapplicable to the present, as there an action was brought for non-performance of a contract to purchase land, and the question was one of general damages. This rule must therefore be absolute.

Rule absolute.

(a) 7 M. & W. 474; S. C. 8 Dowl. 860.

June 12.

BUGG v. SCOTT.

[*Bail Court. Coram Wightman, J.*]

A verdict having been recovered at the Spring assizes for a cause of action which might have been the subject of a plaint in a County Court, the plaintiff signed judgment on the 25th of April for the amount of the verdict, leaving a blank for costs. On the 6th of June, notice to tax the costs was served on the defendant, and on the following day the costs were taxed, final judgment signed, and execution issued. On the 10th of June, the defendant obtained a rule nisi to set aside the judgment and execution (if any), and to enter a suggestion to deprive the plaintiff of costs under the County Courts' Act: *Held*, that the motion to enter the suggestion was not too late, but would only be granted upon payment of the cost of signing the judgment and issuing the execution.

THIS was a rule calling upon the plaintiff to shew cause why the judgment signed herein, and execution (if any), should not be set aside, and why the plaintiff should not forthwith bring in the record and carry in the roll, in order to enable the defendant to enter a suggestion to deprive the plaintiff of costs under the County Courts' Act, 9 & 10 Vict. c. 95.

The affidavits in support of the rule shewed that a verdict for 3*l.* had been found for the plaintiff in the above action, which was in trespass, at the last Spring Assizes for the county of Suffolk; and stated the necessary facts to bring the case within the 129th section of the County Courts' Act. On the 6th of June, the defendant was served with a notice to tax on the following day. He attended before the Master on the following day, and requested an adjournment in order that he might move to enter a suggestion. The Master refused to accede to the request, and completed the taxation, and gave his allocatur for the amount. Judgment was signed by the plaintiff for 3*l.* damages and 93*l.* 12*s.* costs, and execution issued.

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The affidavit in answer shewed that judgment had been signed on the 25th of April last, and that on the 1st of June the costs were taxed, and execution was issued and lodged with the sheriff of the county of Suffolk; which execution had since been put in force by the said sheriff, who was then in possession of the goods, chattels and effects of the defendant under the same.

The rule was obtained on the 10th of June.

Lush shewed cause. This motion is made too late. In cases of motions to enter suggestions under the Court of Requests' Acts, the rule formerly was, that they must be made before judgment was signed. When power was given to the Judge before whom the cause was tried to certify for speedy execution, it became the rule, that the party might come within the first four days of the next Term. But at no time had he the whole of the succeeding Term for making the application. In *Smith v. Temperley* (a), the question within what time a defendant must apply for a suggestion to deprive the plaintiff of costs was much discussed; and it was held, that where a Judge at nisi prius granted a certificate for speedy execution,

(a) 4 D. & L. 510; S. C. 16 M. & W. 273.

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and judgment was signed and execution issued, the defendant must come within the first four days of the ensuing Term, and in other cases before final judgment signed. In a previous case of *Godson v. Lloyd* (a), it had been held, that the defendant might come after judgment signed, if the costs had not been taxed. It will probably be said, that the defendant was not bound to come to this Court for a suggestion, until the plaintiff shewed that he intended to claim costs by proceeding to tax them. The defendant, however, it is submitted, was bound to come as soon as the plaintiff signed judgment, in which a blank was left for the amount of costs in the usual manner, shewing that he meant to claim them (b). But even if he were not, it may be a question whether, as the costs were taxed on the 7th of June, this rule, which was obtained on the 10th, is in time. [*Wightman, J.*—I think that coming within three days is coming within a reasonable time.] The plaintiff is entitled to his costs by the Statute of Gloucester, unless the defendant enters a suggestion. By the 129th section, it is true, if a verdict “be found for the plaintiff for a sum less than 20*l.*, if the said action is founded on contract, or less than 5*l.* if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs;” but the Courts have decided that the mode by which the defendant is to avail himself of this provision is by entering a suggestion, and to do this he must come promptly.

Power, in support of the rule, was not called upon.

WIGHTMAN, J.—I do not think that the defendant can be prevented from coming to this Court for a suggestion, merely on the ground of the delay which has occurred in

(a) 4 Dowl. 157.

(b) See *Soames and Another v. Cooper*, 6 D. & L. 238 ; S. C. 3

Exch. 38. *Robieson v. Rees*, ante, p. 69. *Read v. Blayney*, ante, p. 106.

this case, as the words of the act are very strong, and the defendant might fairly enough presume that the plaintiff would not sign any judgment for costs. At the same time, if he intended to avail himself of the provisions of the statute in his favour, he ought to have adopted the mode which the Courts have pointed out as the proper one in such cases, and have moved to enter a suggestion. As, however, he has not done so, but chosen to lie by, and suffer the plaintiff in the mean time to sign judgment, he must pay the costs of signing judgment, and, if execution has issued, of the execution also.

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Rule accordingly.

HOPKIN v. DAGGETT.

June 12.

[*Bail Court. Coram Wightman, J.*]

PEARSON moved to set aside a rule for judgment, and the judgment (if any entered), upon an issue of nul tiel record, in the above case.

Two days' notice of a trial by the record is sufficient, where the party, giving the notice, is the party producing the record.

It appeared that, on the 29th of April in the present year, the defendant had pleaded to the above action a plea of nul tiel record. On the 10th of May, issue was joined and notice of trial given; but, by mistake, the plaintiff had made up the issue and notice of trial as if the fact were to be tried by a jury, and not by the Court. On the 6th of June, a summons to amend the replication was taken out; and, on the 7th, an order to that effect was made by a learned Judge at Chambers. On the 8th, the plaintiff delivered an amended replication, but no issue, and at the same time withdrew the former notice of trial and issue delivered, and gave notice that he would produce the re-

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cord on the 12th of June. On the 10th of June, he delivered a copy of the amended issue.

Pearson. The plaintiff was not in a condition to give a valid notice of trial until the 10th of June, as until then no proper issue had been delivered; and a two days' notice of trial was too short. In 2 *Chit. Arch.* 838, 8th ed., it is said, that where the plaintiff replies to a plea of nul tiel record, he may "make up the issue and deliver it as in ordinary cases. It is the same in form as in an issue triable by the country, excepting the conclusion." [*Wightman, J.*—Mr. *Archbold* only says "in form" the notice is to be the same as that in ordinary cases.] It should have been a four days' notice.

WIGHTMAN, J. (after consulting with Master *Bunce*).—I understand the usual practice is to require two days' notice only. If the notice were to call upon the opposite party to produce the record, four days' notice would have been necessary; but here the defendant has nothing to prepare for, and the reason for a longer notice does not apply. There is, therefore, no analogy to a notice of trial in ordinary cases, where the object is to give the defendant a reasonable time to prepare for his defence.

Rule refused.



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SEYMOUR v. MADDOX.

June 12.

[*Bail Court. Coram Wightman, J.*]

THIS was a rule, calling upon the plaintiff to shew cause why an order of a learned Judge, admitting him to sue in formâ pauperis, should not be discharged, and the plaintiff be dispaupered.

It appeared that the order had been obtained on the 30th of January, in the present year, before writ issued, upon an affidavit of the plaintiff, which stated the necessary facts, but which did not contain his "addition," in compliance with the Reg. Gen., Hilary Term, 2 Wm. 4, r. 5 (a). A copy of the order and a copy of the writ of summons were served on the defendant's attorney on the 2nd of February. The present rule was not obtained till the 11th of June, and within three days of the day for which notice of trial was given. It was, however, sworn on the part of the defendant, that he was not aware of the defect in the affidavit until the 8th of June.

Keane shewed cause. It may be admitted that the affidavit is informal, but the defect amounts merely to an irregularity, and is waived by the lapse of time which has occurred before obtaining the present rule. To take advantage of an irregularity, the party complaining of it must come within a reasonable time, which generally

The omission of a deponent's addition in an affidavit, in pursuance of Reg. Gen., Hil. Term, 2 Wm. 4, r. 5, is an irregularity merely, and the party seeking to take advantage of it, must come to the Court within a reasonable time.

A reasonable time in such cases dates from the time when the party complaining of the irregularity had the means of knowing it; although, in point of fact, he did not know of it till afterwards.

(a) The affidavit was as follows:—

"In the Queen's Bench.

"Richard John Seymour, of No. 6, Cirencester Place, Upper Marylebone Street, in the county of Middlesex, maketh oath and saith, that he is not worth five pounds in the world, save and except his wearing apparel, and the matter in question in this cause."

"Sworn," &c.

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means, before taking a fresh step in the cause. Here several steps have since been taken, and it is only when the cause is ready for trial that this rule is moved for.

Montagu Chambers, in support of the rule. It is submitted that the affidavit is a nullity. The case of *Owen v. Hurd* (a), seems to shew, that if an affidavit is not entitled, it is as if it were no affidavit at all. [*Wightman*, J.—Suppose a party were to shew cause and take no objection to such an affidavit, could he afterwards come and take advantage of the defect?] Perhaps not. [*Wightman*, J.—Then that shews that it is not a nullity.] In *Sharpe v. Johnson* (b), a delay of two months in taking an objection to an affidavit of debt, on the ground that it was not sworn before a proper commissioner, was held to be no waiver of it. The complaint here is, of a disobedience by the plaintiff of a rule of Court; and the defendant cannot waive it.

WIGHTMAN, J.—This rule must be discharged. The case cited is clearly distinguishable; as there the objection was, that the affidavit was sworn before a party who had clearly no jurisdiction to take it. Here the defect is a mere irregularity, and if the defendant intended to take such an objection, he should have gone and examined the affidavit.

Rule discharged.

(a) 2 T. R. 643.

(b) 4 Dowl. 324; S. C. 2 Scott, 407; 2 Bing. N. C. 246.



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In re LLOYD.

June 12.

[In the Queen's Bench.

Coram *Lord Campbell, C. J., Coleridge, J., and Erle, J.*]

THIS was a rule, calling upon one Lloyd to shew cause why he should not be committed for practising as an attorney without being properly qualified.

The jurat of the affidavit, upon which the rule had been granted, was as follows: "Sworn by" A. B., and C. B., "the above named deponents, at my Chambers, Rolls Gardens, Chancery Lane. Dated this 24th day of April, 1850. V. Williams."

The jurat of an affidavit was as follows: "Sworn by" A. B., &c., "at my Chambers," &c. "Dated this 24th day of April, 1850. V. Williams." Held defective, as not shewing when the affidavit was sworn; and the Court discharged a rule nisi obtained upon it, but without costs, and gave the party liberty to renew the application.

Sir *F. Thesiger* (*Hawkins* with him), appeared to shew cause. There is a preliminary objection. The jurat of the affidavit, upon which this rule is obtained, is defective. It does not shew, as it ought to do, when the affidavit was sworn. The word "Dated" does not refer to the time when the affidavit is sworn, and it cannot be rejected altogether, so as to refer the word "sworn" to the date named. In indicting for perjury on such an affidavit as this, it might be difficult to ascertain when the affidavit was really sworn.

The Court called upon,

D. D. Keane, in support of the rule, to answer this objection. The expression "Dated this 24th day of April," must refer to the time at which the affidavit is sworn. [*Coleridge, J.*—Suppose that the jurat was prepared some days before the affidavit was sworn. *Lord Campbell, C. J.*—It may be very material to know the

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exact day on which the affidavit was sworn.] The word "Dated" may be treated as surplusage, and rejected altogether, and then the date will read as the date on which the affidavit was sworn. The jurat is the memorandum of the Judge when the affidavit is sworn; and the party speaking in it is the Judge, and not the party swearing.

LORD CAMPBELL, C. J.—The rule is well established, that the time when the affidavit is sworn should be stated in the jurat. One object of the rule is to prevent discussion as to when the affidavit is really sworn. Looking at the grammatical construction, the sentence ends before the word "Dated." That word interposes between the place where it was sworn, and the "24th day of April." It may be true that the affidavit is dated on the 24th of April, yet not sworn on that day. I regret exceedingly that this objection should prevail, but it is essential to the purposes of justice, that established rules should be adhered to. This application may be renewed on a similar affidavit being properly sworn.

COLERIDGE, J.—I am of the same opinion. We must adhere to the established rule, and this affidavit does not satisfy that rule. The jurat merely states that the affidavit was sworn, but not when it was sworn.

ERLE, J., concurred.

Sir *F. Thesiger* applied that the rule might be discharged with costs, and cited *Blackwell v. Allen* (a), and *Cobbett v. Oldfield* (b).

LORD CAMPBELL, C. J.—There is no rule of Court, nor

(a) 7 M. & W. 146.

(b) 4 D. & L. 492; S. C. 16 M. & W. 469.

am I aware of any rule of practice, requiring that a rule discharged on such an objection being taken, should be discharged, with costs. In the present case it must be discharged, without costs.

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COLERIDGE, J., and ERLE, J., concurred.

Rule discharged, without costs (*a*).

(*a*) See *Duke of Brunswick v. Harmer*, ante, p. 505.



HOWELL v. RODBARD.

June 1, 17.

[In the Exchequer of Pleas.

Coram Pollock, C. B., Parke, B., and Rolfe, B.]

CROWDER moved, on behalf of the plaintiff, that the Master be ordered to review his taxation in this case by allowing the plaintiff the costs of the trial.

No allocatur had been given, but this application was, by agreement of both parties (*a*), made to the Court.

(*a*) Unless by agreement of the parties, the Court will not, before taxation, direct upon what principle the costs shall be taxed; *Head v. Baldrey*, 8 A. & E. 605.

A declaration contained two counts for an injury to the reversion: the first for damages to the surface of land; the second for damages to the foundation of a house. The defendant pleaded, first,

not guilty to both counts; secondly, no reversion as to both counts; thirdly, a justification to the first count under a mining lease, to which there was a replication, and a demurrer, on which judgment was given for the defendant; fourthly, the Statute of Limitations to both counts; and fifthly, a plea to the second count, upon which the jury were, by consent, discharged from giving a verdict. There was also a new assignment, and a plea of not guilty to it.

On the trial the verdict was on not guilty as to part of the first count for the plaintiff, with 140*l.* contingent damages: as to the residue of the first count, and as to the second, for the defendant; on the plea of no reversion, and as to the plea of the Statute of Limitations as to both counts, for the plaintiff; as to the new assignment, the verdict was for the defendant.

Held first, that the plaintiff was not entitled to the costs of the trial under the Statute of Gloucester, as he could not have judgment for the damages assessed. Secondly, that he was entitled, under 4 Ann. c. 16, to his costs as to the second count and that part of the first on which he had succeeded under the issues of no reversion and the Statute of Limitations; and that those costs should not be confined to the mere costs of the pleadings, but should include a portion of the expenses of briefs and witnesses.

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The facts of the case sufficiently appear from the judgment of the Court.

Crowder cited *Bird v. Higginson* (a), and *Partridge v. Gardner* (b).

Cur. adv. vult.

PARKE, B., delivered the judgment of the Court.—Mr. *Crowder* applied a few days ago to review the Master's taxation. No allocatur had been given, but it was suggested that the motion was made for the guidance of the Master.

The case was this.—The declaration contained two counts, each for an injury to the reversion. The first count was for damages to the surface of land, the second for damages to the foundation of a house.

There were several pleas. First, not guilty to both counts. Secondly, no reversion as to both counts. Thirdly, a justification to the first count under a mining lease; to which there was a replication, and a demurrer to the replication, and judgment for the defendant was given on demurrer. Fourthly, the Statute of Limitations to both counts. And, fifthly, another plea was pleaded to the second count not material to be noticed, for the reason afterwards given. There was also a new assignment, and a plea of not guilty to it.

On the trial the verdict was, on not guilty as to part of the first count, for the plaintiff, with 140*l.* contingent damages; as to the residue of the first count, and as to the second, for the defendant; on the plea of no reversion, and on the plea of the Statute of Limitations as to both counts, for the plaintiff. On the fifth plea, the jury were discharged by consent, and as to the new assignment the verdict was for the defendant. Under these circumstances the question was, to what costs the plaintiff was entitled.

(a) 5 A. & E. 83; S. C. 6 N. & M. 799.

(b) 4 Exch. 303.

The case differs both from that of *Bird v. Higginson* (a), and *Partridge v. Gardner*. From the former, because there the only issue on the trial as to one cause of action, that in the first count, was found for the plaintiff; from the latter, because in it all the issues on the trial were found for the plaintiff. We adhere to our decision in the case of *Partridge v. Gardner*, which we are satisfied was perfectly right.

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The plaintiff can recover costs only under the Statute of Gloucester (b) as part of the damages, or under the statute of Anne (c), where there are double pleas. Here he has no right under the Statute of Gloucester, as to the part on which damages were assessed, as he cannot have judgment for those damages on that part; nor as to that part under the statute of Anne, because the plaintiff has succeeded on the trial on all the issues as to that part of the count, and according to the construction put by the cases on that statute, it only applies where the defendant succeeds on some one issue, which entitles him to judgment on the whole record, that is, as to all the causes of action, or any one of them, to which there is double pleading; that is by way of punishment for improper double pleading: for if the plaintiff succeeds as to the whole of the causes of action, or one, his only claim is under the Statute of Gloucester. Here, the plaintiff succeeds on all the issues as to part of the first count, but fails on the demurrer, and can have no judgment on that part of the first count to recover his damages, and no costs as to that part of the first count. But to the second count and part of the first there is double pleading, and the defendant has succeeded on the first issue as to part of the first and as to the second count, and the plaintiff has obtained a verdict on the issues on two other special pleas to the same cause of action; therefore, as to part of the first and the second count, it is a case of

(a) 5 A. & E. 83.

(c) 4 Ann. c. 16, ss. 4, 5.

(b) 6 Edw. 1, c. 1.

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double pleading, and as to that part of the first, and the second count, the plaintiff is entitled to the costs of the special pleas under the statute of Anne; not confined to the mere costs of the pleadings, but including a portion of the expenses of briefs and witnesses, according to the rule laid down in *Hart v. Cutbush* (a), and *Spencer v. Hamerton* (b).

But we understand from the Master that he offered to tax the costs on this principle; therefore there will be no rule, but the costs will be so taxed without any rule.

Direction to the Master accordingly.

(a) 2 Dowl. 456.

(b) 4 A. & E. 413; S. C. 6 N. & M. 22.

April 16.
June 20.

In the matter of BRUNSKILL v. POWELL.

[In the Exchequer of Pleas.

Coram *Pollock, C. B., Parke, B., Rolfe, B., and Platt, B.*]

Where some items of an account are for goods sold, and others for money lent, the plaintiff may bring two separate complaints in the County Court; the items being of a different character, and not constituting one "cause of action," within the meaning of the 9 & 10 Vict. c. 95, s. 63.

CROMPTON moved for a prohibition to restrain the Judge of the St. Helen's County Court of Lancashire, and James Brunskill, from proceeding in a plaint between James Brunskill and James Powell.

It appeared upon the affidavits of the defendant, that he was served on the 9th of February, 1850, with a summons from the St. Helen's County Court of Lancashire, to answer the plaintiff in an action of contract, the sum mentioned therein being 20*l.* The particulars annexed to the summons set out an account between the plaintiff and the defendant, which amounted to 31*l.* 8*s.* 8*d.*, consisting of items for wine, ale, and spirits supplied by the plaintiff to

the defendant, from August the 3rd, 1844, to April the 11th, 1845. The defendant was afterwards, on the 1st of March, served with a second summons issuing from the same Court, and at the suit of the same plaintiff. The particulars annexed to which shewed that the plaintiff claimed 5*l.* 1*s.* 6*d.*, for money lent at various times, from October, 1844, to April, 1845. The first plaint came on for hearing in the County Court and the plaintiff proved the whole account, but abandoned the excess, and judgment was given against the defendant for 20*l.* The second plaint was still pending. It was also stated in the affidavit, that there was no agreement or understanding between the plaintiff and the defendant that the items relating to money lent, and those relating to goods supplied, should be kept separate, but they were entered by the plaintiff in one account, and the plaintiff had delivered to the defendant an account containing all the items contained in both accounts, arranged according to their respective dates.

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Crompton. This is an application to restrain the plaintiff from proceeding with the second action, on the ground that the County Court has no jurisdiction, the debt or damage claimed by the plaintiff being part of one entire account or cause of action, which is above 20*l.* Sect. 58 of the County Courts' Act, 9 & 10 Vict. c. 95, gives the Courts jurisdiction in "all pleas of personal actions, where the debt or damage claimed is not more than twenty pounds." By sect. 63 it is enacted, that "it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said Courts." Here the cause of action is above 20*l.*, and the plaintiff is attempting to divide it so as to bring it within the jurisdiction of the County Court. The meaning of the words "cause of action," was decided in *In re Grimby v. Aykroyd* (a), where this Court held, that they meant "cause of one action,"

(a) 5 D. & L. 701 ; S. C. 1 Exch. 479.

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and, therefore, that in the case of tradesmen's bills, in which one item is connected with another, in the sense that the dealing is not intended to terminate with one contract, but to be continuous, so that one item if not paid, shall be united, and form one entire demand; such demand, if it exceeds, 20*l.*, ceases to be within the jurisdiction of the County Court. The present case is within the rule so laid down, and is clearly an evasion of the 63rd section (*a*).

Cur. adv. vult.

PARKE, B., delivered the judgment of the Court.—The question we have to decide in this case is, whether the claim for which the plaintiff sues in the County Court, is within the rule laid down by this Court in the case of *In re Grimby v. Aykroyd* (*b*). We think it is not, as here the demand was for goods supplied, and also for money lent, which are debts of a different character; so that it is not like the case of one running account for items of the same nature, as in the case alluded to. There will, therefore, be no rule.

Rule refused (*c*).

(*a*) It was also suggested that the plaintiff, by abandoning the excess in the first action, had waived all further claim against the defendant. The Court, however, thought not; as it did not appear that he had done any act amounting to an abandonment of his present claim. See *Vines v. Arnold*, Com. Pleas, Mich. Vac.

1849; and *The Apothecaries' Company v. Burt*, *ante*, p. 405.

(*b*) 5 D. & L. 701; S. C. 1 Exch. 479.

(*c*) See *Wickham v. Lee*, Q. B., Trin. Vac. 1848, where it was held that rent in arrear, and a demand of double value for holding over under 4 Geo. 4, c. 28, are separate causes of action within sect. 63.



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SOUTHGATE v. SAUNDERS.

June 4, 22.

[In the Exchequer of Pleas.

Coram *Parke, B., Alderson, B., Rolfe, B., and Platt, B.*]

A RULE had been obtained calling on the plaintiff to shew cause why the defendant should not be discharged out of the custody of the sheriff of Middlesex as to this action, the defendant having obtained a protection from arrest under the 12 & 13 Vict. c. 106.

The following facts appeared upon the affidavits. The action was commenced on the 25th of July, 1849, and was brought to recover 21*l.* 14*s.*, with interest, against the defendant as the indorser of a bill of exchange. On the 10th of November, notice of trial was given, and on the 28th, the cause was tried and a verdict found for the plaintiff for 22*l.* Judgment was signed on the 8th of December, in pursuance of a certificate of the Judge; the costs were taxed on the 19th, at 57*l.* 14*s.* 3*d.*; and on the 18th of May, 1850, the defendant was arrested by the sheriff of Middlesex under a ca. sa. to levy the debt and costs.

The defendant, who was a trader within the Bankrupt Act, on the 12th of November, 1849, had presented a petition to the Court of Bankruptcy in the form contained

After issue joined and before trial, defendant, a trader, petitioned the Court of Bankruptcy for protection under the 12 & 13 Vict. c. 106, s. 211. At the time when he filed his account the cause had been tried, and a verdict found against him for 22*l.*, but judgment had not been signed. He described the debt in his account as "W. S. Disputed, estimated at 50*l.*, has got judgment for 22*l.* and costs." The proposal made by the

defendant at the first private sitting was to pay "7*s.* 6*d.* in the pound," "with a satisfactory guarantee for the due payment of the same." The assent at the second private sitting was "to accept 7*s.* 6*d.* in the pound upon the amount of our respective claims," &c., "the amount being guaranteed by" S. S. and H. S. The defendant obtained a protection from arrest; but having been subsequently taken upon a ca. sa. founded upon the judgment in the above action:

Held, upon motion for his discharge from custody, first, that the debt was sufficiently stated in the account.

Secondly, that the protection applied to the costs as well as to the debt itself.

Thirdly, that although the form of the agreement with the creditors was imperfect,—the proposal and the assent not being in the same terms, and the guarantee not being to all the creditors, but only to those who signed the assent,—the protection was valid.

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in Schedule (A. a.) (a) of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106). On the same day the petition was filed, together with the necessary affidavit in the form contained in Schedule (A. b.); and the Court of Bankruptcy made an order protecting the person and property of the defendant from process until further order, and appointed an official assignee, and also appointed a private sitting for the 20th of December, of which notice was duly given to the plaintiff and the other creditors.

On the 7th of December, the defendant filed a full account of his debts, &c. in the form directed by the act, and set forth the following proposal for the compromise of his debts: "I propose to pay my respective creditors the sum of 7s. 6d. in the pound, by way of composition upon the amount of their respective claims, in three equal instalments at 2s. 6d. each; the first instalment at four months, the second at eight months, and the third at twelve months from the date of the petition, with a satisfactory guarantee for the due payment of the same." On the following day he furnished a copy of the account to the official assignee.

At the time of the filing of the account, the costs in the action not having been taxed, the plaintiff's debt was specified in the account filed by the defendant as follows:—

SOUTHGATE, Wm. Disputed { Estimated at 50*l.*, has got
judgment for 22*l.* and costs. } 50*l.*

The first private sitting was held on the 20th of December, when the defendant attended and swore to the truth of the account. The plaintiff and several other creditors, who had proved their debts to the amount of 10*l.* and upwards, were present, three-fifths of whom in number and value then assented to the proposal made by the defendant.

The second private sitting was held on the 31st of January, 1850, when three-fifths of the creditors then present, among whom was the plaintiff, passed and signed a resolution, in the following form: "At a meeting held,"

(a) Petition for arrangement.

&c., "we, the undersigned creditors of," &c., "who have proved," &c., "do hereby consent and agree to the proposal agreed to at the last meeting, namely, to accept the sum of 7*s.* 6*d.* in the pound, by way of composition upon the amount of our respective claims, in three equal instalments of 2*s.* 6*d.* each; the first instalment at four months, the second at eight months, and the third at twelve months from the date of the filing of the said petition, in full discharge of our respective debts; provided the amount of such composition be guaranteed by" S. S., of, &c., and H. S., of, &c.

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The agreement was confirmed by the Court of Bankruptcy, and the second sitting adjourned till the 2nd of February, when the Court, after hearing such creditors as desired to be heard, again confirmed the agreement, and directed that it should be filed, and granted a certificate of confirmation endorsed with a protection from arrest until the 12th of April, which was afterwards enlarged to the 22nd of July.

Humfrey shewed cause. Several questions arise in this case as to the construction of the Bankrupt Act, 12 & 13 Vict. c. 106. The provisions relating to arrangements made with creditors under the controul of the Court, are contained in the sections from 211 to 223. In the first place, the debt is not properly specified. The debt is described as "disputed," and it could not be said to be disputed, since a verdict had been obtained. The description is erroneous also in stating that the plaintiff had got judgment for 22*l.*, whereas he had only obtained a verdict for that amount, and judgment had not been signed. [*Platt, B.*—If it had been intended to describe it as a judgment debt, the costs would not have been stated merely as "estimated."] The debt is also misdescribed in respect of its amount: it is stated to be 50*l.*, whereas the debt and costs amount to 79*l.* 14*s.* 3*d.*, as the defendant at the time of his proposal, which was after the taxation of costs, must have known. He claims, in effect, to be discharged from a much larger sum than he has inserted in his account.

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Secondly, the claim for costs had not arisen at the time of the petition, and therefore could not be included in the protection. This is not a proceeding under the Insolvent Act, 1 & 2 Vict. c. 110, but an arrangement made by the defendant with his creditors on his own proposal; no compromise could be made as to the costs, inasmuch as their amount was not determined. [*Parke, B.*—Under the old Bankrupt Act, if the debt was barred, the accessaries, as the costs, were barred also.] If the defendant obtained his certificate under sect. 221, it operates “to all intents and purposes as fully as if the same were a certificate of conformity under a bankruptcy.” The effect of the certificate under a bankruptcy is stated, in sect. 200, to be, that it discharges the bankrupt from “all debts due by him when he became bankrupt, and from all claims and demands made proveable under the bankruptcy.” Here, the defendant could not be discharged from the costs, inasmuch as their amount was not determined when his petition was filed, nor when his account was made out; and, therefore, could not be proved.

A third objection to the proceedings is, that the Court had no power, in the present case, to confirm the proposal and grant a certificate to the defendant. By sect. 216, the creditors may, at the second meeting, prove their debts, “and if three-fifths in number and value of those who have proved debts to the amount of ten pounds shall agree to accept such proposal as was assented to at the first sitting, the terms thereof shall be reduced into writing, and the creditors shall sign the same;” the section then proceeds to empower the Court to “approve and confirm the same.” Here, the proposal which was assented to by the creditors at the first sitting was, that the defendant should pay 7s. 6d. in the pound by instalments, “with a satisfactory guarantee for the due payment of the same;” but the proposal assented to at the second meeting was, “provided the amount of such composition be guaranteed by” S. S., &c.; and as it was not the same as that of the first meeting, the Court had no power to confirm it.

The proposed guarantee is also insufficient, inasmuch as it relates only to the amount of composition payable on “our respective claims;” that only applies to those who signed the assent, and not to the rest of the creditors.

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Bramwell, in support of the rule. As to the objection, that the proposal by the defendant and the acceptance by his creditors were not identical, it is to be observed, that the Court may, by sect. 211, at any time renew the protection independently of the agreement of the creditors; so that the defendant, whose protection has been renewed, is still entitled to be discharged. But there is no variance between the proposal and acceptance, for, by sect. 215, the creditors are to assent to the proposal, “or to any modification thereof;” and it is not till the second sitting that it is to be reduced into writing; shewing that at the first sitting the arrangement is not final, but at the second it is to be rendered final and more certain.

It is said that the form of the guarantee is bad, because it is not given to all the creditors; but, by the act, the agreement of three-fifths is the agreement of all. [*Parke*, B. — ‘The act only enables three-fifths to bind the whole.’] The proposal, and not the performance of it, is what the Court of Bankruptcy is to act on; and if the guarantee is improper or insufficient, application should be made to the Court to carry out the proposal.

As to the first objection; a trifling inaccuracy ought not to vitiate the proceedings if substantial information is given, as under the Protection Acts (*a*); otherwise the defendant would be deprived of protection by the slightest inaccuracy in the statement of the account. When the petition and account were filed, the costs had not been taxed; and the defendant, therefore, could not know their amount, and could give no better statement of their amount than the one he has given.

(*a*) See 7 & 8 Vict. c. 96, s. 30. See a similar provision in Insolvent Act, 1 & 2 Vict. c. 110, s. 93.

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It is said that the defendant is not entitled to protection as to the costs of the action; but they cannot be separated from the judgment debt. This Court cannot say how much is for the debt, and how much for costs. [*Parke, B.*—Is it not as if there were two debts, one due now, and one when the costs are taxed?] The defendant, being discharged from the debt, is discharged from the costs also. *Lewis v. Piercy* (a), and *Brind v. Bacon* (b), decided that this was so under the 49 Geo. 3, c. 121, s. 8. [*Parke, B.*—That is clear; for there the discharge is in the nature of a statutable release, and the principal being released, the accessory is released with it; *Vansandon v. Corsbie* (c). Here the discharge is only a special protection under the act.] Why should not it be the same here? the release in that case was not voluntary. [*Parke, B.*—Under the old Bankrupt Act, the plaintiff could not prove his costs under the bankruptcy, because they were not then determined; and he could not afterwards sue for them, for the discharge, annulling the debt itself, annulled them also.] The objection in the present case would equally hold good if all the property of the defendant had been assigned under the Bankrupt Act, which would be manifestly unjust.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—In this case a rule nisi was obtained to discharge the defendant out of custody, on the ground that he was protected from arrest for the debt and costs for which he was taken in execution, by a protection granted under the statute 12 & 13 Vict. c. 106; and cause was shewn, and the case fully argued before my Brothers *Alderson, Rolfe, Platt*, and myself.

It appeared on the affidavits, that on the 12th of November, 1849, the defendant presented his petition to the Court of Bankruptcy for protection, under the

(a) 1 H. Bl. 29.

(b) 5 Taunt. 183.

(c) 1 Chit. 16.

211th section of that act, and on the same day had a protection granted to him. A private meeting was appointed, pursuant to the 213th section for the 20th of December, of which fourteen days' notice was given to the plaintiff, and on the 7th of December, the account of debts due from him and his estate and effects, with the proposal for compromise required by the 214th section, was filed, and on the 8th, a copy given to the official assignee. On the 20th of December, the defendant was examined on oath at the private meeting, and proved the truth of the account. Three-fifths of the creditors assented to the proposed compromise, which was confirmed on the 12th, and the protection extended to the 12th of April, 1850. On the 17th of May, it was again extended to July, and whilst that protection was in force the defendant was arrested on a ca. sa. issued in this action, for 22*l.*, debt, and 79*l.* 14*s.* 3*d.*, costs, and he now applies to be discharged, on the ground of his protection.

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The debt for 22*l.*, was due from the defendant to the plaintiff at the time of the defendant's petition, and issue had been then joined in this action. The cause was tried on the 28th of November, when a verdict was found for the plaintiff; and costs were taxed on the 19th of December, at 79*l.* 14*s.* 3*d.*, and judgment signed for the debt and costs.

The account filed by the defendant on the 7th of December, of his debts and effects, stated those due to the plaintiff as follows:—"Southgate, William, disputed, has got judgment for 22*l.* and costs, estimated at 50*l.*"

The question on these facts is, whether the defendant is entitled to be discharged as to the claim of 22*l.*, and the costs, or either. We think he is entitled to his discharge from both.

This depends on the construction of 12 & 13 Vict. c. 106, sects. 211 to 223. Sect. 211 enables the debtor to petition. Sect. 214 requires him to file "a full account of his debts, and the consideration thereof." Sect. 215

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requires the creditors to prove the debts at the private sitting of the Court, and the petitioner is to attend and make oath of the truth of his account already filed, and may be examined thereon, and then, three-fifths of the creditors to the amount of 10*l.*, are to have the option of assenting to, or dissenting from, the proposed arrangement; and by sect. 216, the arrangement, if approved, shall be reduced into writing, and signed, and then becomes binding on all persons who were creditors at the date of the petition and who had notice of the sittings; and the Court may approve and confirm it, and enter it of record, and shall grant to the petitioner a certificate of the filing and entering of record, and shall endorse on such certificate a protection from arrest, and the petitioner shall be free from arrest at the suit of a person being a creditor at the time of the petition, and having had such several notices; with a proviso that such protection shall be valid, *inter alia*, against any creditor whose debt is not truly specified in the account filed by the petitioner. By sect. 221, as soon as the agreement has been carried into effect, and the creditors are satisfied, according to its tenor, the Court shall give a certificate, which shall operate to all intents and purposes as fully as a certificate of conformity under a bankruptcy, with certain exceptions not material now to be noticed.

Upon this statement of facts several objections were taken to the defendant's right to be discharged: first, that the debt was not truly specified in the account; secondly, that the defendant was not protected against the claim for costs, because they had not arisen until the taxation, and after the account was filed; and thirdly, that the certificate was given upon an imperfect agreement of the insolvent with his creditors, which could not be enforced; and, therefore, that the protection endorsed on the certificate was void.

As to the first objection, the debt of 22*l.* is no doubt correctly described as to amount, but it is represented to be

“disputed,” whereas the verdict shews it to have been due. We think this makes no difference. The admission of the insolvent would not dispense with the proof of the debt under sect. 215, nor his “disputing” it render it necessary.

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It was also contended that the debt was not truly specified, because at the time the defendant swore to the truth of the account, the judgment had been signed, and the costs taxed, and, therefore, the statement that the costs were uncertain was incorrect; but it is clear that the oath is taken to the correctness as it stood when it was filed.

The second was the most important objection. No debt accrued with respect to the costs until they were taxed, on the 19th of December, and that debt was not comprised in the account; and the question is, whether the protection extends to this debt, which did not accrue till after the protection. Certainly it would not, if this were a new distinct debt arising after the petition; but it is an accessory only to the principal debt, and the claim for costs would certainly have been barred by a certificate under sect. 221, as it certainly would by a certificate in bankruptcy, though it could not be proved under the fiat. The certificate under this section would be granted when the resolution and assent should be carried completely into effect, and in the meantime it is highly reasonable that the petitioner should have his person at liberty to enable him to manage his affairs, and to secure the completion of the arrangement. We think that the protection granted under sect. 211, has this effect. The power of the commissioner is to grant a protection of the person and property of the petitioner from all process; but that, of course, is limited to existing creditors at the time of the petition, as the petition implies; schedule (A. a.); and the form of the protection given in this is from arrest “at the suit of any person *being a creditor* at the date of the petition.” Of course it applies only to an action as such creditor for the then existing debt, but it precludes him from exercising his right to arrest in such an action, and it is only in such arrest, and in that action only,

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he could arrest for the costs. The remedy is entire for both, and, therefore, is a bar altogether. We are therefore of opinion, that the insolvent is to be discharged from arrest, as to both debt and costs.

The last objection is, that the certificate being founded on an incomplete arrangement for the guarantee sanctioned by the creditors, is void, as it expresses no sufficient consideration. The form adopted is certainly unfortunate, and it is open to considerable doubt whether it would be valid. Possibly it may be supported by considering the meaning of the terms as addressed to all the creditors, and of their consent to be that of three-fifths; but be this as it may, the protection of the commissioners is still valid under sect. 211, whatever difficulties the form of the guarantee may create as to enforcing it. The form should certainly be altered for the future.

Rule absolute.

May 1.
June 24.

CALLANDER v. HOWARD.

[In the Common Pleas.

Coram *Wilde, C. J., Cresswell, J., Williams, J., and Talfourd, J.*]

To a declaration by drawer against acceptor of a bill of exchange, the defendant pleaded, that

after the accruing of the causes of action, and before action brought, the defendant and plaintiff accounted together concerning the said causes of action, and concerning other claims and demands of the plaintiff against the defendant, and of the defendant against the plaintiff; that upon such accounting, a small sum, to wit, 50*l.*, was found due to the plaintiff by the defendant, which the defendant promised to pay; and that afterwards, and before action brought, the defendant paid plaintiff a large sum, to wit, 50*l.*, in full satisfaction and discharge of such sum so due to him.

Held, upon special demurrer, a good plea.

ASSUMPSIT by drawer against acceptor of three bills of exchange, for 300*l.*, 354*l.*, and 278*l.* respectively. The declaration contained also counts for goods sold and delivered, money paid, interest, and upon an account stated.

Fifteenth plea to the whole declaration,—that after the accruing of the causes of action in the declaration mentioned, and before the commencement of this action, to wit, on, &c., the defendant and plaintiff accounted together, and an account was then stated between them of and concerning the said causes of action, and of and concerning certain other claims and demands of the plaintiff against the defendant, and certain other claims and demands of the defendant against the plaintiff, and on that accounting a certain small sum of money, and no more, to wit, the sum of 50*l.*, was then found to be, and then was, due and owing from the defendant to the plaintiff; which sum of money the defendant then, in consideration of the premises, promised the plaintiff to pay to him on request. And thereupon the defendant afterwards, and before the commencement of this suit, to wit, on the 1st day of January, 1848, paid to the plaintiff, who then accepted and received of and from the defendant, a large sum of money, to wit, the sum of 50*l.*, in full satisfaction and discharge of such last mentioned sum so due and owing from the defendant to the plaintiff as last aforesaid. Verification.

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Special demurrer and joinder.

Channell, Serjt., in support of the demurrer. The plea is bad upon several grounds. First, it does not shew what the defendant's claims and demands were, in respect of which an account was stated; it is, therefore, consistent with the plea that they were illegal or unjust,—in which case the causes of action mentioned in the declaration would not be extinguished. Further, the plea does not allege that any *debts* were the subject of the account; the words "claims and demands" are satisfied by that which does not amount to a debt. It may therefore be, that the account stated included only such claims and demands—as, ex. gr., for a trespass or for an assault—as are not debts. The plea is also bad, as it does not shew that it was agreed that the plaintiff's claim should be extinguished, or that

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the counter-claim of the defendant was accepted by the plaintiff in satisfaction of his claim, or that the latter ever accepted the 50*l.* for any thing but in satisfaction of that amount of his claim. The plea is, in substance, a plea of set-off, or of payment, and ought to have been pleaded as the one or the other; but in its present form it has blended both defences. It is similar to the third plea in *Learmonth v. Grandine* (a), which was said by *Parke, B.*, to be a tricky plea; but it ought at least to have followed that precedent, by averring not only that a debt was due from the plaintiff to the defendant, but also by stating what that debt was for,—as, ex. gr., for money lent, money paid, &c.; and it ought also to have stated, as in that plea, that the parties had accounted concerning that debt, and that the plaintiff had been discharged to a corresponding amount. *Sutton v. Page* (b) will, probably, be relied upon on the other side. The plea in that case was, it is true, similar to the present one, but no question arose in the argument as to its validity. The plaintiff did not specially demur to it, but replied by traversing the accounting, not only concerning the causes of action in the declaration mentioned, but also concerning the other claims and demands alleged in the plea to have been the subject of account between the parties; and the only question was, whether the traverse was well taken. That case, therefore, is no authority for the defendant.

Crompton, contra. The plea is good. It is, in substance, the same as that which is stated in *Com. Dig. tit. "Pleader,"* (2 G. 11), to be a good plea, viz., "So to an assumpsit, the defendant may plead that, since the promise made, he and the plaintiff insimul computaverunt, et super compot' ill' ipse inventus fuit in arrear so much, which he has paid." The plea is sufficient if it shews that there were cross claims and

(a) 4 M. & W. 658.

(b) 3 C. B. 204; S. C. 4 D. & L. 171.

one general accounting, upon which a balance was come to and paid. *Parke*, B., in pointing out the deficiencies of the plea in *Smith v. Page* (a), shews what is necessary to make such a plea good; and this plea will be found to contain all the requisites there mentioned by the learned Judge. Next, it has never been held necessary to allege that the claims and demands between the parties were legal and just, or to shew what they were. "Claims and demands" must mean legal claims and demands; and to set them all out on the plea would have been idle, for it has always been considered sufficient to allege generally that an account was stated, that a balance was ascertained, and that that balance was paid. Perhaps the last allegation is unnecessary to the validity of the plea. If *Sutton v. Page* does not directly decide that this plea is good, it shews at least that it never occurred to the counsel or the Court that the plea was bad, as is now contended.

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With respect to the objection that the plea does not shew that the plaintiff's causes of action mentioned in the declaration were extinguished, the answer is, that that is the very essence of this plea. It is unnecessary to inquire what is the principle of law upon which the plea is based,—whether the act of striking a balance converts the set-off into payments, according to *Alderson*, B., in *Ashby v. James* (b), or whether, as was said by *Rolfe*, B., in the same case, it is a transaction out of which a new consideration arises for a promise to pay the balance;—it is sufficient to say that by coming to an account, and striking a balance, the parties extinguish the old debt. "If A. be indebted to B., and afterwards they come to an account for all matters between them, this is a discharge of the debt;" *Com. Dig.* tit. "*Action upon the Case upon Assumpsit*" (G). [He also referred to *Scholey v. Walton* (c); *Clark v. Alexander* (d); *Worthington v. Grimsditch* (e); *Pott v. Clegg* (f); *Com. Dig.*

(a) 15 M. & W. 683, 686.

(b) 11 M. & W. 542.

(c) 12 M. & W. 510.

(d) 8 Scott N. R. 147.

(e) 7 Q. B. 479.

(f) 16 M. & W. 321, 326, 327,
per *Parke*, B.

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tit. "*Accord*" (B 4); *Good v. Cheesman* (a); *Evans v. Powis* (b); and *Cocking v. Ward* (c).]

Channell, Serjt., in reply.

Cur. adv. vult.

TALFOURD, J., delivered the judgment of the Court. (After stating the pleadings, his Lordship said):—If the plea in this case amounts to an allegation of the allowance of cross demands upon an account stated, and payment of the balance, there seems to be no doubt but that it sets up substantially a good defence to the action. This appears to have been established, and the reason of the doctrine expounded, at a very early period.

Thus, in *Co. Litt.* 212 b, it is said, "If the obligor or feoffor be bound by condition to pay 100 markes at a certaine day, and at the day the parties do account together, and for that the feoffee or obligee did owe 20*l.* to the obligor or feoffor, that sum is allowed, and the residue of the 100 markes paid, this is a good satisfaction, and yet the 20*l.* was a chose in action, and no payment was made thereof but by way of retainer or discharge." The authority cited for this passage is a case to that effect in the Year Book, 11 Rich. 2, tit. "*Barre*," 3. 43 (d), which is stated in *Roll. Abr.* tit. "*Condition*" (E), pl. 5, and translated in *Vin. Abr.* tit. "*Condition*" (E d), pl. 5; where the reason for the

(a) 2 B. & Ad. 328.

(b) 1 Exch. 601.

(c) 1 C. B. 858.

(d) Cited by *Rolle* and *Viner* as "12 R. 2, *Barr.* 243." "There is no Year Book of the reign of Richard 2 in print; but Sir *Matthew Hale* says he had seen the entire Years and Terms of this King in manuscript." (*Hist. Com. Law*, 169). "There are some cases of this reign to be found in *Jenkin's Centuries*; some in *Keilwey*; some in *Benloe*, and

some in *Fitzherbert's Abridgment*.

All these scattered notes have been collected by *Bellewe*," (*les ans du Roy Richard le Second*), "and digested under heads, making a sort of substitute for a Year Book of this King." *Reeves' Hist. of Eng. Law*, vol. 3, p. 218, 4th ed. The passage referred to in the text is probably that given in *Fitzherbert's Abridgment*, folio 148 *ad finem*, where 12 R. 2 is referred to in the margin.

decision is said to be, that "this is all one as if the obligor had paid to the obligee, and he had repaid him. This is a payment by way of retainer." This same case from the Year Books was also cited by the Court in *Hayford v. Andrews* (a), and shewn to be good law: "for there the agreement at the day to retain is as a payment, and thereby the obligation is discharged." And the same view was taken in the modern cases cited at the Bar, viz., by *Alderson*, B., in *Ashby v. James* (b), by *Parke*, B., in *Scholey v. Walton* (c), and by *Tindal*, C. J., in delivering the judgment of this Court in *Clark v. Alexander* (d).

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But although these authorities demonstrate that a settlement of an account, in which one item is agreed to be set off against another, amounts to a payment of the sums thus set off, yet there are other authorities which shew that this adjustment of the account, together with the implied or express promise to pay the balance, cannot be regarded as an extinguishment of the original debt; and, consequently, that it cannot be set up, by a plea in assumpsit, as affording, per se, a defence to an action, but must be treated in pleading as a payment.

A contrary view, indeed, was taken in the case of *Milward v. Ingram* (e). There, in an action of indebitatus assumpsit, the defendant acknowledged the promises laid in the declaration, but pleaded that afterwards, and before action brought, the plaintiff and he accounted together concerning divers sums of money, and that on the foot of the account he was found to be indebted to the plaintiff in 30s.; whereupon, in consideration that the defendant promised to pay him that sum, the plaintiff likewise promised to release and acquit the defendant of all demands. On demurrer, this was held a good plea. And *North*, C. J., though he conceded (f) that, if there were but one debt betwixt the plaintiff and the defendant, entering into an account for

(a) Cro. Eliz. 697.

(b) 11 M. & W. 542.

(c) 12 M. & W. 510.

(d) 8 Scott, N. R. 147.

(e) 1 Mod. 205; S. C. 2 Mod.

43; 1 Freem. 195.

(f) 1 Mod. 206.

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that would not determine the contract,—expressed his opinion (a), that after such an account as that stated in the plea, the plaintiff could never have recovered on the first contract, which was thereby merged in the account. “If A.,” said Lord Chief Justice *North*, “sells his horse to B. for 10*l.*, and there being divers other dealings between them; if they come to an account upon the whole, and B. is found in arrear 5*l.*, A. must bring his insimul computasset, for he can never recover upon an indebitatus assumpsit.” And of the same opinion were the other three justices. But this opinion has been since overruled. Thus in *The Mayor of Scarborough v. Butler* (b), where, in assumpsit for 60*l.* for money had and received by the defendant to the plaintiffs’ use, the defendant pleaded, that after the promise he and the plaintiffs accounted, and on the account the defendant was found in arrear to the plaintiffs, allocatis allocandis, in 14*l.* only, which he tendered and they refused, and tout temps prist, &c.; and the plaintiffs replied, that on the said account the defendant was found in arrear 60*l.*, absque hoc that he was found in arrear 14*l.* only; on which issue was joined, and found for the plaintiffs, with 60*l.* damages: it was moved to arrest the judgment, because it appeared by the replication that there had been an accounting on the promise declared upon, whereby the action and the duty had been extinguished by the account, and the action ought to have been brought upon that only. But the Court gave judgment for the plaintiffs, saying that the new promise on the account was only a chose in action, and that one chose in action could not be discharged by another chose in action of the same nature. Again, in *May v. King* (c), indebitatus assumpsit was brought for 40*l.* for work done, and on a quantum meruit for the same. The defendant pleaded, that there being mutual dealing between the plaintiff and him, they came to an account, and that it did appear on the account that the defendant was in arrear to the plaintiff but 5*l.*, which he

(a) 2 Mod. 44.

(b) 3 Lev. 237.

(c) 12 Mod. 537, 8; S. C. 1
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promised to pay him ; in consideration whereof the plaintiff did discharge him of the said debt and claim. On demurrer, this was held a bad plea. And per *Holt*, C. J., “If one bind himself in a bond for the payment of 20*l.* to A. by a day certain ; and A. buys a horse of the obligor of the value of 20*l.* before the day, and then they two account together, and 20*l.* is set and agreed for the horse ; in action brought upon the bond he cannot plead the general issue ; *yet he may plead solvit ad diem and must not plead it by way of account, but it must be pleaded according to the operation it has in law*, and that is to be a payment ; and so here. As if tenant for life grant his estate to him in reversion, it is a surrender, and must be pleaded as such, and not by way of grant ; so here to plead this by way of account, when the operation in law is payment, will be ill. And per ipsum, if there be two dealers, and without coming to account they agree to be clear against one another, it would not be well, without coming to an account ; and the case quoted out of the *Mod.* was the first of this kind, and by my consent shall be the last. And to plead it as an account is but argumentative of *payment*, which is direct, and therefore not to be allowed.” On the authority of this case that of *Adderley v. Evans* (a), and *Roades v. Barnes* (b), were decided. The former case was assumpsit by an executor for —*l.* due to the testator for work and labour, &c. Plea, that the testator and the defendant accounted together, and the defendant was found in arrear 12*l.*, and had paid 10*l.* to the testator, and the remaining 2*l.* to the plaintiff. And this was held a bad plea on demurrer. This case was followed by that of *Roades v. Barnes*, where in assumpsit the defendant pleaded a stated account between himself and the plaintiff before action brought, and a balance in favour of himself, the defendant, and that the plaintiff promised to pay such balance ; and this was held to be no good plea.

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(a) 1 *Ld. Ken.* 250, 391 ; *S. C.* *Burr.* 9 ; 1 *W. Bl.* 65, nom. *Sayer Rep.* 269. *Rolls v. Barnes.*

(b) 1 *Ld. Ken.* 391 ; *S. C.* 1

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Without overruling the three cases last mentioned, it appears to us to be impossible to deny that this plea is bad, unless it, in effect, sets up the allowances in account by way of partial payments, and an actual payment of the residue. It is not enough to plead merely the accounting, notwithstanding the plea proceeds to aver a payment of the balance; for although there was no such averment in the plea which was held bad in *May v. King* (a), yet there was such in *Adderley v. Evans* (b); and in *Roades v. Barnes* (c), the balancing on the accounting was in favour of the defendant. The question, therefore, is, whether the plea in the present case can be regarded as treating the allowances in account as partial payments.

The passage cited at the Bar from *Com. Dig. tit. "Pleader"* (2 G. 11), and the case of *Richardson v. Richman*, stated in *Kearslake v. Morgan* (d), and the dictum of *Parke, B.*, in *Smith v. Page* (e), are in favour of the plea. And it should be observed, that in *Adderley v. Evans*, and *Rolls v. Barnes*, no satisfactory reason is suggested why the plea should not be regarded as amounting to a plea of payment. It is certainly convenient to plead it in the present shape, rather than to plead it directly as a plea of payment, because it explains to the plaintiff in what way the defendant proposes to contend that the payment has taken place. And if it should be objected, that the plea ought to have stated with particularity the counter claims, on the allowance of which it is intended to insist, the answer is that, in many cases, the so doing would lead to great and inconvenient length and complexity of pleading. On the whole, therefore, we think the plea is sufficient; and that our judgment ought to be for the defendant.

Judgment for the Defendant.

(a) 12 Mod. 537 ; S. C. 1 Ld. Raym. 680.

(b) 1 Ld. Ken. 250, 391 ; S. C. Sayer Rep. 269.

(c) 1 Ld. Ken. 391 ; S. C. 1

Burr. 9 ; 1 W. Bl. 65 ; nom. *Rolls v. Barnes*.

(d) 5 T. R. 513.

(e) 15 M. & W. 686, 687.

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BATTY v. MELILLO.

June 7, 24.

[In the Common Pleas.]

Coram *Wilde, C. J., Maule, J., Cresswell, J., and
Talfourd, J.*

ASSUMPSIT. The writ was dated the 23rd of August, 1848.

This cause came before the Court on a special demurrer to the declaration, which was on promises. It set forth an agreement by which it was agreed by the plaintiff and the defendant, that the defendant and his wife should, from the 17th of July, 1848, for three months appear, perform, and assist to the best of their ability, as equestrians on the stage and in the ring, in all performances and entertainments which might be produced at Astley's Ampitheatre, or elsewhere, under the direction of the plaintiff, in such parts and in such manner as the plaintiff or his deputy should require; and should attend all rehearsals and calls when so required, and should conform and be subject to the printed rules and regulations of the theatrical establishment of the plaintiff;

The writ was dated the 23rd of August. The declaration,—after stating that defendant had agreed on the 17th of July to appear and perform for three months as an equestrian on the stage and in the ring, in all performances to be produced at A. or elsewhere under the direction of plaintiff, in such parts as plaintiff should require, and should attend rehearsals

when required—alleged, that although plaintiff had an establishment at P. under his direction for equestrian performances, and although during the subsistence of the said agreement, and before the expiration of the three months, to wit, &c., plaintiff gave defendant notice that he required him to join plaintiff's establishment for the purpose of appearing and performing in the performances to be produced at the said establishment under the direction of plaintiff; and although a reasonable time elapsed from the giving of such notice to the commencement of the suit, defendant did not nor would join the said establishment at P., nor appear or perform in the performances to be produced.

Held, upon special demurrer, that as plaintiff's establishment at P. was alleged to be "for equestrian performances," it sufficiently appeared that the notice given to join plaintiff's establishment, was a notice to perform "on the stage and in the ring."

Held also, that the declaration averred a good breach of the promise laid—the promise to perform as an equestrian on the stage and in the ring, and to attend rehearsals, when required by the plaintiff, involving an engagement so to join an establishment of plaintiff for equestrian performance, as to be ready to accomplish the objects of the requisition.

Held also, that it sufficiently appeared—from the date of the writ, and from the averment that a reasonable time had elapsed from the giving of the notice to the commencement of the suit,—that a reasonable time had elapsed after the notice and before the expiration of the three months.

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the plaintiff furnishing two horses for the defendant and his wife, and they finding their own dresses for the equestrian performances. The agreement, as recited, further contained an undertaking by the plaintiff to pay the defendant and his wife 5*l.* per week for their said services, and a stipulation that on any breach of it, for which no forfeit was provided, the party breaking it should pay 50*l.* as liquidated damages, and the other party have the option of avoiding it.

The declaration having alleged mutual promises to perform the agreement, proceeded to aver, "that although plaintiff had an establishment at Peebles, in that part of the United Kingdom called Scotland, under his direction for equestrian performances and entertainments, and although plaintiff was ready and willing to furnish two horses according to the said agreement, and although under and in pursuance of the agreement, and during the subsistence of the agreement, and before the expiration of the said term of three months, to wit, on, &c., plaintiff gave notice to the defendant that plaintiff required defendant and his wife to join plaintiff's said establishment at Peebles, under the direction of plaintiff, for the purpose of appearing, performing, and assisting in the performances and entertainments to be produced at the said establishment, under the direction of the plaintiff; and although a reasonable time had elapsed after the giving the notice, and before the commencement of the suit, for defendant and his wife to join the said establishment of plaintiff for the purpose aforesaid, and although plaintiff has always been ready to perform his part in the said agreement, yet defendant and his wife did not nor would, nor did either of them, when so required as aforesaid, or at any time afterwards, join the said establishment of the plaintiff at Peebles aforesaid; nor appear, perform, or assist in the performances and entertainments to be produced at the said establishment of the plaintiff, but wholly neglected and refused so to do, and therein failed and made default." The declaration further alleged the default to be one in respect of which no forfeit

was declared in the rules referred to; a consequent liability of defendant to plaintiff to pay 50*L.*, and his failure to pay that sum.

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The special grounds of demurrer assigned were, that the requisition to defendant and his wife to join the establishment for the purpose of performing, did not express that they were to appear in performances on the stage or in the ring; nor, with certainty, that they were required to appear as equestrians, nor that the establishment for equestrian performances was of such performances "on the stage and in the ring;" that there was no allegation that a reasonable time had elapsed after giving the notice and before the expiration of the three months; that no promise to join the establishment was alleged, and that the declaration shewed no breach of the alleged promise (*a*).

Cleasby, in support of the demurrer.

Prentice, contra.

Cur. adv. vult.

MAULE, J., now delivered the judgment of the Court. (His Lordship, after stating the pleadings as above set forth, said):—We have considered the arguments addressed to us in this case, and are of opinion that the declaration is good in substance, and is not defective in any of the respects pointed out as grounds of special demurrer. It seems to us that the promise to appear in any place under the direction of the plaintiff in the performances described, in such parts and manner as plaintiff should require, and to attend all calls and rehearsals, involves an engagement so to join an establishment of plaintiff for equestrian performances as to be ready to accomplish the objects of the requisition; and that a failure to comply with such a

(*a*) The above statement of the pleadings is taken from the judgment.

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requisition, and a refusal to assist in such performances, are sufficiently alleged to shew a breach of defendant's contract. The objections to the generality of the requisition, as not stating the performances intended to be equestrian, or on the stage and in the ring, appear to us unfounded; for as the establishment of plaintiff at Peebles is alleged to be "for equestrian performances," it may be reasonably intended that such were the performances at which the defendant was required to assist; and it cannot be assumed that such performances were other than "on the stage and in the ring,"—which words are obviously used in the agreement, not to restrict the obligation of defendant, but to expound it as embracing both modes of equestrian representation. The objection that there is no averment that a reasonable time elapsed after the notice and before the expiration of the three months, is obviated by the statement that the writ was issued on the 23rd of August, 1848,—much within that term,—and is supplied by the averment that such time had elapsed before the commencement of the suit. The breach substantially shews an entire refusal of defendant to perform his contract, which would render any particular appropriation of character on the plaintiff's part unnecessary; and although this part of the declaration might have been more artificially framed, it seems to us that, in the absence of any other objection to it than the general one, that the declaration does not shew any breach by defendant of his promise, it discloses a good cause of action. On the whole, therefore, our judgment will be for the plaintiff.

Judgment for the Plaintiff.



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STANTON v. STYLES.

June 24.

[In the Exchequer of Pleas.]

Coram *Alderson, B., and Platt, B.*]

DEBT for goods sold and delivered, use and occupation, and on an account stated.

Plea (a) to the first count by way of estoppel, that the defendant had issued a plaint in the County Court against the plaintiff for a sum of 10*l.* 6*s.* 8*d.*; that the plaintiff had, upon the hearing, set up as a defence, that the defendant was indebted to him in the sum of 15*l.* 0*s.* 6*d.*, for goods sold and delivered, and had given notice that he would, at the hearing, claim to set off the 15*l.* 0*s.* 6*d.*, against the debt due to the defendant; that such proceedings were thereupon had, that it was adjudged that the defendant was not indebted to the plaintiff in the sum of 15*l.* 0*s.* 6*d.*, or any part thereof, and that the plaintiff had no claim against him in respect thereof; and that the defendant should recover against the plaintiff the sum of 10*l.* 6*s.* 8*d.*, and costs, amounting to 5*l.* 15*s.* 4*d.*, as by the record, &c., and which said judgment is in full force and effect. The plea then averred the identity of the claim set off, and of the debt and cause of action in the said first count mentioned; concluding with a verification by the record, and prayer of judgment.

(a) There was another plea which was demurred to. The defendant, however, on the argument, elected to amend it.

Held, on demurrer, that the replication was a good answer to the plea of estoppel, since it shewed that there had been no decision in the County Court by which the plaintiff was concluded.

To a declaration in debt the defendant pleaded, by way of estoppel, that he, the defendant, had sued the plaintiff in the County Court for a debt, and the plaintiff had then attempted to establish as a set-off, the claim for which he now sued, and that judgment was given against the now plaintiff as to that set-off. The plaintiff replied that he had not given any notice of his intention to rely on the set-off, in accordance with sect. 76 of the County Courts' Act, 9 & 10 Vict. c. 95, and rule 17, and that defendant did not consent to his setting off the debt.

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Replication,—after stating the making of the rules by the Judges for the regulation of the practice of the County Courts, under sect. 78, of the 9 & 10 Vict. c. 95, and setting out the rule 17,—that the plaintiff did not give any notice of his set-off in the plea mentioned to the clerk of the said County Court, five clear days before the return of the summons, as required by the said rules; but therein made default, nor did the defendant consent to his setting off the debt and sum of money in the first count mentioned, or to his setting up such set-off by way of defence in the County Court. Verification, and prayer of judgment.

Special demurrer, and joinder.

Lush, in support of the replication (*a*). The replication gives a clear answer to the plea. The 76th section of the 9 & 10 Vict. c. 95, prevents a defendant from setting off any debt or demand “without the consent of the plaintiff, unless such notice thereof as shall be directed by the rules made for regulating the practice of the Court shall have been given to the clerk of the Court;” and by rule 17, of the rules framed by the Judges, and in pursuance of the 78th section, it is provided, that “where a defendant desires to set off any debt or demand alleged to be due to him by the plaintiff, he must give notice thereof in writing to the clerk of the Court, and deliver to such clerk two copies of a statement of the particulars of such set-off, five clear days before the return of the summons.” As the plaintiff in the present case failed to establish his set-off in the County Court, because he had omitted to give the required notice, and because the defendant would not consent to his giving proof of his set-off; the validity of his claim has never been discussed, much less decided on the

(*a*) *Lush* began, as there was a demurrer to another plea, *ante*, p. 575, note.

merits; and consequently there is no estoppel to prevent the plaintiff from non-suing for that claim.

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Bovill, in support of the demurrer. The replication gives no sufficient answer to the plea. It is said, that as the decision in the County Court was given against the plaintiff only because he had omitted to give the proper notice under the rules, he is, therefore, not to be estopped from suing again for the sum which he sought to set off. But, it is submitted, the record of the County Court is conclusive against him, because it must be taken to be absolute verity. If the argument of the plaintiff be correct, it would apply equally to civil and criminal cases, and to cases in the superior Courts, where any required form has been omitted; as, ex. gr., where no rule to plead had been obtained, or where, in an action for the infringement of a patent, the defendant neglects to give the proper notice of objections under the statute (*a*). [*Alderson*, B.—In a case of set-off the matter is not on the record. Suppose a plea of set-off is demurred to and held to be bad, would that be an estoppel?] It is submitted it would. In *Eastmure v. Laws* (*b*), it was held, that a verdict having been found against a defendant upon a plea of set-off, he was estopped from suing the plaintiff for the demand specified in his plea of set-off. *Tindal*, C. J., there says: “It has been urged, that there is a hardship in concluding defendants by the result of a plea of set-off, while a plaintiff who fails in an action may elect to be nonsuited, and bring a fresh action when he is better prepared. But it is the defendant’s election to put such a plea on the record; and if, before or at the trial, he wishes it, on proper terms the issue may be withdrawn: after all, it is entirely a matter of his own election.” [*Platt*, B.—But here the defendant would not allow the plaintiff to go into his case of set-off.]

(*a*) 5 & 6 Wm. 4, c. 83, s. 5.

(*b*) 5 Bing. N. C. 444, 451; S. C. 7 Scott, 461; 7 Dowl. 431.

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Lush, in reply, was stopped by the Court.

PER CURIAM.

Judgment for the Plaintiff (a).

(a) Where the judgment of an inferior Court is pleaded as an estoppel, the plaintiff may always shew that the parties were not within the jurisdiction; *Briscoe v. Stephens*, 2 Bing. 213; S. C. 9 Moore, 413; or that the practice of the inferior Court is bad in law; *Williams v. Lord Bagot*, 3 B. & C. 772; S. C. 5 D. & R. 719; or that the proceedings were irregular; *Prat v. Dixon*, Cro. Jac. 108; *Ward v. Ellayn*, lb. 261; *Thompson v. Blackhurst*, 1 N. & M. 266.

January 11. In re the HAMMERSMITH RENT-CHARGE ALLOTMENTS,
July 8. 1364 and 1365.

[In the Exchequer of Pleas.

Coram *Pollock, C. B., Parke, B., Alderson, B., and Platt, B.*]

A writ having issued to the sheriff by order of a Judge, under sect. 82 of the Tithe Commutation Act (6 & 7 Wm. 4, c. 71), requiring him to summon a jury and assess the arrears of a rent-charge, and return the inquisition, the sheriff took the inquisition.

In the following Term, the tenant of the land obtained a rule nisi to set aside the Judge's order and proceedings under it. That rule being discharged, the Master, in taxing the costs of the inquisition, included in his allocatur such costs as were incurred by the owner of the rent-charge after the inquisition had been taken, in resisting the rule to set aside the order. *Held* (dissentiente *Parke, B.*), that such costs were properly allowed by the Master as "costs of such inquisition."

A RULE had been obtained in last Michaelmas Term, calling upon one John Holt to shew cause why an order, made by *Parke, B.*, in the above matter, should not be rescinded.

The following facts appeared upon the affidavit of the managing clerk of the attorneys of the Rev. F. T. Atwood, vicar of Hammersmith, upon which the present rule was obtained, on the 29th of September, 1848. The order was made ex parte by *Platt, B.*, for a writ to issue to the sheriff of Middlesex to summon a jury to assess the arrears of

rent-charge apportioned on lands, numbered 1364, and 1365, in the plan annexed to the Hammersmith apportionment, of which John Holt was the tenant in possession, pursuant to 6 & 7 Wm. 4, c. 71, ss. 82 and 85. The writ was accordingly issued, bearing teste on the 29th of September, and returnable on the 6th of November then next. The inquisition was taken on the 12th of October, and in the following Term, a rule nisi was obtained, on the part of Holt, to rescind the order of *Platt*, B., of the 29th of September, and to set aside the writ, and all subsequent proceedings had thereon, on the ground, that the Judge had no right to make the order *ex parte*. This rule came on for argument, and on the 12th of June, 1849, was discharged (a). Upon attending the Master for the purpose of taxation, the bill of costs, incurred by Mr. Atwood in the matter, included such costs as were incurred by him, after the inquisition had been taken, in resisting the rule to set aside the order of *Platt*, B. To the allowance of these costs, Holt's attorney objected; the Master, however, overruled the objection, and proceeded to tax the bill, upon the principle of allowing such costs. Holt's attorney took out a summons to review the taxation, which was heard on the 26th of June, before Mr. Baron *Parke*, who stated it as his opinion, that no costs of the opposition to the summons and rule should be allowed, and made the following order: "that the Master do review his taxation of costs in this matter, by disallowing costs subsequent to the inquisition, but allowing up to it." This order it was now sought to rescind. It was sworn that it was believed that the amount of the costs, which would be so disallowed, amounted to at least three-fifths of the whole.

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Lush and *Bovill* shewed cause. The question is, whether the costs incurred in opposing a rule (which was afterwards discharged) for setting aside an order for a writ

(a) This case will be reported in 7 D. & L.

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of inquisition, under the 6 & 7 Wm. 4, c. 71, s. 82 (a), on the ground that it had been improperly obtained, are "costs of such inquisition," within the meaning of that section; and it is submitted they are not. The rule is clear, that where a rule does not form part of the necessary and regular proceedings in the cause, but is merely collateral to the action, the costs are not costs in the cause; 2 *Chit. Archb.* 1388, 8th ed. Here the rule was strictly collateral to the action; it was not a necessary or regular proceeding in the cause; and if the owner of the rent-charge claimed the costs, he ought, when the rule was discharged, to have applied to the Court to discharge it with costs; for he cannot now claim the costs as costs of the inquisition. The rule would have been discharged with costs; but having been discharged generally, it must be taken that it was discharged without costs. This is, in truth, an attempt to review the decision of the Court.

The Attorney General, Hugh Hill, and J. Jones, in support of the rule. The statute intended to give the owner of the rent-charge an easy remedy to obtain payment of it; whereas the construction contended for by the other side, might, in a case where the rent-charge was a small sum, impose upon him fifty times the amount of costs in attempting to recover it. [*Parke, B.*—Should you not

(a) Sect. 82 enacts, "that in case the said rent-charge shall be in arrear," &c., "and there shall be no sufficient distress," &c., "it shall be lawful for any Judge," &c., "upon affidavit," &c., "to order a writ to be issued, directed to the sheriff of the county in which," &c., "requiring the said sheriff to summon a jury to assess the arrears of rent-charge," &c., "a copy of which writ, and notice of the time and place of executing the same, shall be given to the owner of the land," &c., "and the costs of

such inquisition shall be taxed by the proper officer of the Court; and thereupon the owner of the rent-charge may sue out a writ of *habere facias possessionem*, directed to the sheriff, commanding him to cause the owner of the rent-charge to have possession of the lands chargeable therewith until the arrears of rent-charge found to be due, and the said costs, and also the costs of such writ and of executing the same, and of cultivating and keeping possession of the lands, shall be fully satisfied."

have applied to the Court at the time, to discharge the rule with costs?]

According to the view which the owner of the rent-charge takes of sect. 82, he was entitled to the costs as “costs of such inquisition,” and, therefore, it was not necessary to ask for them. The proper rule for ascertaining what are costs of the cause, and which, it is understood, the taxing Masters adopt, is to see whether they are the costs of taking or maintaining any step necessary to the existence of the cause; for, if so, they are costs of the cause. It was necessary for the existence of the inquisition, and for obtaining the fruits of it, that the rule in question should be opposed and discharged. In *Rex v. The Justices of the City of York (a)*, it was provided by the terms of a local act, empowering certain trustees to purchase lands, &c., that in the event of a disagreement between them and the owners, as to the amount to be paid for the lands, a jury should be summoned, and that if the jury gave a verdict for more than the trustees offered, the “costs and expenses” of summoning and returning such jury and witnesses, and also of the inquest, were to be borne by the trustees; and it was held, that under the words “costs of such inquest,” the owner was entitled to the costs of the inquiry, including witnesses, attendance by attorney at the inquest, conferences and briefs, and not merely the expenses of the sheriff and jury. Mr. Justice *Littledale*, in giving judgment, says, “The 28th section describes the inquest to be held, and points out what is to be done. All the expenses incidental to this proceeding appear to me to be costs of inquest; as would be the case with costs of an inquisition or trial.” The Statute of Gloucester, (6 Edw. 1, c. 1, s. 2), gives only “the costs of his writ purchased;” but that has been held to extend to all the legal costs of the cause.

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The learned Judges, having differed in opinion, now delivered their judgments separately.

(a) 1 A. & E. 828, 834; S. C. 3 N. & M. 685.

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PLATT, B.—In this case a rule was obtained, calling upon the owner of a tithe rent-charge to shew cause why an order of my Brother *Parke*, directing the Master to review his taxation of costs, by disallowing costs subsequent to the caption of an inquisition, under the 6 & 7 Wm. 4, c. 71, should not be discharged. In September, 1848, in pursuance of the 82nd section of the statute, I had, upon an affidavit of the requisite facts, ordered that a writ should issue directed to the sheriff of the county of Middlesex, and requiring him, in the terms of that section, to summon a jury to assess the arrears of the rent-charge, and to return the inquisition thereupon to be taken. A writ issued accordingly; and the sheriff, in obedience to it, took the inquisition in October, 1848. In the following Term, the tenant of the land obtained a rule nisi for setting aside my order, and the proceedings taken under it. That rule having been discharged in Trinity Term, 1849, the Master in taxing the costs of the inquisition, had included in his allocatur such costs as after the inquisition had been taken had been incurred by the owner of the rent-charge in resisting the rule to set aside the order which had directed the writ to issue. On this state of facts, my Brother *Parke* made the order which the owner of the rent-charge seeks to discharge by the now pending rule. The question, therefore, before the Court is, whether the costs which that order directed the Master upon a review of his taxation to disallow, were part of “the costs of the inquisition” within the meaning of the 82nd section of the 6 & 7 Wm. 4, c. 71. By that section it is enacted, that in case the rent-charge shall be in arrear for the space of forty days next after any half-yearly day of payment, and there shall be no sufficient distress on the premises liable to the payment thereof, it shall be lawful for any Judge of her Majesty’s Courts of record at Westminster, upon affidavit of the facts, to order a writ to be issued, directed to the sheriff of the county in which the lands chargeable are situate, requiring the sheriff to summon a jury to assess the arrears of rent-charge remaining unpaid, “and to return the inquisition

thereupon taken" to some one of her Majesty's Courts of law at Westminster, on a day therein to be named, a copy of which writ and notice of the time and place of executing the same shall be given to the owner of the land ten days before the execution of the same; "and the costs of such inquisition shall be taxed by the proper officer of the Court; and thereupon the owner of the rent-charge may sue out a writ of habere facias possessionem, directed to the sheriff, commanding him to cause the owner of the rent-charge to have possession of the lands chargeable therewith until the arrears of rent-charge found to be due, and the said costs, and also the costs of such writ, and of executing the same, and of cultivating and keeping possession of the lands, shall be fully satisfied." The provisions of the section shew that the Legislature intended that the owner of the rent-charge, in resorting to the remedy therein provided, should be indemnified from all costs necessarily incurred in realising the arrears. What, therefore, in this case, are "the costs of the inquisition" as contemplated by the statute? They must, at all events, include those incurred in taking the preliminary proceedings prescribed by sect. 82; and had the controversy with reference to the validity of the order arisen, and been decided, between the making of the order and the execution of the inquiry, it could hardly be doubted that the costs incurred in that controversy would, on the same principle, be included in the costs of the inquisition, which I understand to be the costs of establishing a valid inquisition, or, in other words, of making good that position which the owner of a rent-charge must occupy before he can advance towards obtaining possession under the habere facias possessionem. What difference in principle can, therefore, exclude the costs in question? The only difference between the two courses of proceeding is, that in the one, cause is shewn against the order before it is made, and in the other, after. The taxation of costs in a suit affords an analogy. On the defendant's omitting to plead in an action of assumpsit, covenant, trespass, or trespass on the case, the plaintiff, in order to obtain final judgment, must sign

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an interlocutory judgment; and, except in the cases in which the damages depend on a correct computation of principal and interest merely, must execute a writ of inquiry. If the defendant in such action should, after omitting to plead, unsuccessfully attempt to set aside the interlocutory judgment or the inquiry, and the plaintiff proceed to final judgment, the plaintiff's costs of resisting those attempts would be taxed as costs in the cause; for which there could be no pretence, unless they are deemed to be costs necessary to establish in the one case the interlocutory judgment, and in the other the inquiry. Both these would be necessary steps in the suit, and the plaintiff's resistance necessary to prevent their avoidance. The costs of opposing a rule to set aside a final judgment cannot, for technical reasons, be made part of the costs of the cause; for in that case the final judgment, which includes the taxed costs of the cause, having been signed, the plaintiff could not have the costs of the opposition taxed as part of such costs without having two final judgments. The Court, therefore, usually discharges such a rule, if groundless, with costs; thereby giving to the plaintiff the only remedy for their recovery. It is said, that the costs now in question are not "costs of the inquisition," but of resisting an abortive attempt to set it aside; they may, however, be more properly designated as the costs of supporting or establishing the inquisition, which, unless they had been incurred, would have been rendered altogether abortive. Costs, so indispensably necessary to the inquisition must, in my judgment, be deemed to be part of "the costs of the inquisition" itself, within the true intent and meaning of the 82nd section. A narrower construction would evidently, in a great majority of the cases contemplated by that enactment, convert what was intended as a remedy into a source of grievous loss to the owner of the charge, whenever he should have the misfortune to be opposed to a litigious land owner. Upon the whole, I think the Master's taxation was right, and that this rule should be made absolute.

ALDERSON, B.—This is a question as to the construction of the 6 & 7 Wm. 4, c. 71, s. 82, by which, in case no sufficient distress be on the premises liable to a tithe rent-charge, and the rent-charge be in arrear, the Court are authorized to order a writ to be issued requiring the sheriff to summon a jury to assess the arrears and to return the inquisition to the Court. Of this proceeding the owner of the land is to have due notice, as specially provided by the act. And on the inquisition being returned, the officer of the Court is to tax “the costs of the inquisition,” which, with the rent-charge in arrear, are to become a charge on the land, of which the owner of the rent-charge is to be put into possession, and to hold it till both are paid.

In this case, the writ having issued *ex parte*, a motion was made by the owner of the land to set aside the writ on that ground; and during the pendency of that rule the proceedings under the inquisition were of course stayed. After full argument that rule was discharged; and then the parties proceeded to tax the costs of the inquisition before the sheriff, in order to carry into effect the act, as soon as this intermediate obstacle to the judgment of the Court and the writ of *habere facias possessionem* given by the section, was removed. And the question is, what are “the costs of the inquisition?” Do they include the costs of this intermediate motion? I think that the reasonable construction of the act is that they do. If we are to construe the words literally, “the costs of the inquisition” would not include even the costs of the writ to the sheriff; for the “inquisition,” literally, is only the matter which takes place actually before him. But every one allows that the costs of the writ, without which the inquisition cannot take place, are part of the costs of the inquisition. And the Statute of Gloucester gives, as my Brother *Parke* observes, the costs of the motion for a new trial which fails, as part of “the costs of the writ.” In truth, these intermediate costs do not, in principle, differ from the costs of the writ. Without the writ there can be no effectual inquisition, and without getting rid of the intermediate obstacle there can be no

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effectual inquisition. If then the costs of the writ are part of "the costs of the inquisition," the costs of getting rid of the intermediate obstacle—that is, the costs of shewing cause against the rule in this case—must be so too. It would have been different, if the application to the Court had been made after the taxation of the costs of the inquisition; and for that reason the costs of the writ of *habere facias possessionem* are expressly given by the act.

This is really like the case of a motion for a new trial which fails, the costs of which are part of the costs of the cause. I think, in cases like the present, we ought to give a liberal and reasonable construction, so as to effectuate, if possible, that which is of the essence of practice—that *primâ facie* he who is in the wrong shall, until the Court for some special reason relieve him from the burden, bear the costs of the argument in which he has failed. If therefore the party thought that he ought not to pay the costs of that argument, he should have applied to the Court to discharge it without costs: it is not for the party who succeeds to ask to have them. *Primâ facie* I think they are part of "the costs of the inquisition." I am of opinion that this rule must be absolute; and I regret that, in so small a matter, the parties should have incurred so much costs, and have been subject to so long a delay.

PARKE, B.—The question in this case turns upon the proper construction of the Tithe Commutation Act, 6 & 7 Wm. 4, c. 71, s. 82.

After an inquisition under that section had been executed, there was an application made to the Court, and a rule nisi obtained to set aside the writ and subsequent proceedings, on the ground that the Judge's order by virtue of which it issued was made *ex parte*. That rule was discharged, the opinion of the majority of the Court being that the Judge might proceed *ex parte*. Nothing was said about the costs of the application. Afterwards, the tithe owner had the costs of the inquisition taxed, and, as part of them, the Master allowed the costs of shewing cause against

the application to set the writ and subsequent proceedings aside.

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I made an order at Chambers to set aside the taxation in that respect, and disallow those costs. A rule nisi was subsequently obtained to set aside my order, and cause shewn in the last Term. I have the misfortune again to differ, as I believe, from the rest of the Court. The question is of importance, not because the result will make any material difference as to the costs of such application, but because, if the tithe owner's construction is to prevail, there will be a departure from the salutary and now well established rule, that the words of a statute are to be construed according to their ordinary grammatical import, unless that would lead to some absurdity, or inconvenience, or inconsistency with the intentions of the framers, to be collected from other parts of the act. It is of little practical importance as to costs, because, if my order was wrong, and costs of shewing cause are to be taxed as "costs of the inquisition," the party failing will hereafter take care to apply for the discharge without costs, and the Court will do justice in that respect. The only difference will be, that the tithe owner, if my order was right, will have a remedy only when the rule of Court gives him the costs, by enforcing that rule against the party applying; whereas, if it was wrong, he will have a remedy for the costs, as part of the costs of the inquisition against the land itself, by holding it till they are paid.

The above mentioned rule has been continually acted on of late years, and ought not to be departed from. The 82nd section provides: [his Lordship read sect. 82.]

Now, under the term "costs of the inquisition," according to its ordinary acceptation, cannot be included the costs of an abortive attempt to set it aside; to include those you must alter the words "and the said costs," as if they directed the costs of the inquisition, and of making it effectual, to be both taxed; and this is contrary to the just principles of construction. The literal construction leads to no absurd or inconvenient result. The tithe owner will

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I made an order at Chambers to set aside the taxation in that respect, and disallow those costs. A rule nisi was subsequently obtained to set aside my order, and cause shewn in the last Term. I have the misfortune again to differ, as I believe, from the rest of the Court. The question is of importance, not because the result will make any material difference as to the costs of such application, but because, if the tithe owner's construction is to prevail, there will be a departure from the salutary and now well established rule, that the words of a statute are to be construed according to their ordinary grammatical import, unless that would lead to some absurdity, or inconvenience, or inconsistency with the intentions of the framers, to be collected from other parts of the act. It is of little practical importance as to costs, because, if my order was wrong, and costs of shewing cause are to be taxed as "costs of the inquisition," the party failing will hereafter take care to apply for the discharge without costs, and the Court will do justice in that respect. The only difference will be, that the tithe owner, if my order was right, will have a remedy only when the rule of Court gives him the costs, by enforcing that rule against the party applying; whereas, if it was wrong, he will have a remedy for the costs, as part of the costs of the inquisition against the land itself, by bidding: till they are paid.

The above mentioned rule has been continually since of late years, and ought not to be departed from. The 82nd section provides: [his Lordship read *sec. 82*]

Now, under the term "costs of the inquisition," according to its ordinary acceptation, cannot be understood as the result of an abortive attempt to set it aside. It is not the case that must alter the words "and the said costs," which are directed the costs of the inquisition. It is not the case that, to be both taxed; and the *principle* of construction. The *principle* is no absurd or inconvenient *rule*.

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get his costs, if he is in the judgment of the Court entitled to them by rule; but, on the other hand, if those words are to be interpolated, the effect will be, that the land owner will always suffer from the improper application by an occupier, the costs of which the owner will have to pay. This is a reason for abiding by the sound rule of construction above mentioned.

The practice of taxing the costs of discharged rules in the progress of a suit, as part of the costs included in a judgment, was referred to as affording an analogy. But it certainly does not. This practice is grounded on the Statute of Gloucester, which enacts, that in all cases where the party is to recover damages, he shall recover his "costs of the writ purchased," together with his damages. Judgment is given for the damages, and those included the "costs of the writ purchased," which, by a long course of construction, has been held to mean all the costs of the action.

The judgment is, "that he recover his damage by him sustained, as well by the trespass," or "grievance," or "breach of promise," as the case may be, "as for his costs and charges by him about his suit in that behalf expended." The judgment alone gives the costs, and all up to the time of judgment must be included in it. But if the Statute of Gloucester had provided that the plaintiff should recover the costs of the trial of the issue, and the costs of shewing cause against a rule for a new trial had always been taxed as part of those of the trial, it would have been an analogous case; as it is, it is no authority.

Upon these grounds, I am of opinion that my order was right.

ALDERSON, B. (*a*), added.—My Lord Chief Baron, before he left the Court, desired me to state, that he concurred with the view taken by my Brother *Platt* and myself.

Rule absolute.

(*a*) The Lord Chief Baron had left the Court to sit at nisi prius.

MICHAELMAS TERM, 14 VICT.

MICHAELMAS TERM,

IN THE FOURTEENTH YEAR OF THE REIGN OF VICTORIA.

DERRY Public Officer of the DEVON and CORNWALL
BANKING COMPANY v. TOLL.

May 27.
November 4.

[In the Exchequer of Pleas.

Coram *Pollock, C. B., Parke, B., Alderson, B., and
Platt, B.*]

DEBT by the plaintiff as public officer of the Devon and Cornwall Banking Company, for work and labour, commission, money lent, money paid, interest, and upon an account stated.

Fourth Plea. As to 390*l.* 13*s.*, parcel, &c., that before the accruing of the causes of action, &c., to wit, &c., it was corruptly and against the form of the statute, agreed by and between the defendant and the said copartnership, that the said copartnership should then and thenceforth and from time to time, as he should require, lend to him certain sums

A plea of usury stated that it was "corruptly and against the form of the statute" agreed between plaintiff and defendant, that plaintiff should advance to defendant, as he should require, sums not exceeding 1000*l.*, by cashing de-

fendant's cheques, and that plaintiff should charge at the rate of 10*l.* per cent. as interest, and under the colour of commission: it then averred that the money was advanced, and the usurious interest was so charged.

Held good on special demurrer, though it stated only the gross sum payable for interest and commission, without alleging how much was attributable to each, it being averred that the agreement was made colourably to enable the plaintiff to take more than 5*l.* per cent.

In pleading usury it is sufficient to allege that it was "corruptly and against the form of the statute" agreed, so as to bring the case within 12 Anne, stat. 2, c. 16, and it is unnecessary to allege that it is not taken out of the operation of that act by 2 & 3 Vict. c. 37.

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of money of such amount respectively as he should require,—but so that all the said sums, so to be lent by them to the defendant, should not, on the whole, exceed 1000*l.*,—by paying out of their own moneys, and over and above such moneys of the defendant as they might hold, to such persons as should be the lawful holder of, and should present to them for payment, cheques signed by the defendant; so as that the amount of the said cheques so to be paid out of their proper moneys should not exceed the said sum of 1000*l.*, upon certain terms, viz.: that the said copartnership should forbear and give to the defendant day and time, for the repayment of all the said sums, to wit, until they, the said copartnership, should demand such repayment, and that for and in respect of such forbearance the defendant should pay to them, certain interest and sums of money to be charged by them to him, partly under the name of interest, and partly under the name of shift and chevisance of commission, which should be charged to the defendant by the said copartnership in respect of, and as the pretended price, value, and remuneration of and for certain work that might or should be thereafter done by the said copartnership for the defendant, at a rate altogether exceeding the rate of 5*l.*, for the forbearance of every 100*l.*, for a year, to wit, at the rate of 10*l.* for the forbearance of every 100*l.* for a year; that afterwards and under, and according to the said corrupt and unlawful agreement, and at divers times after the making thereof, until, and at the commencement of this suit, and the accruing of the causes of action, &c., the said copartnership did lend in the manner aforesaid to the defendant such sums, as amounted to a certain sum, not exceeding 1000*l.*, to wit, the sum of 300*l.*, and that they did charge to him such illegal and excessive interest, as and in the manner aforesaid, partly under the name of interest, and partly under the said name of shift and chevisance of commission as aforesaid, upon the said sum so lent and advanced to him, that is to say, interest at the said rate of 10*l.* for the forbearance of every

100*l.* for a year, upon the sums so advanced and lent as aforesaid, from the respective times when the same were so lent until and at the commencement of this suit. The plea then went on to identify the sum of 300*l.* as parcel of the moneys claimed in the declaration, and concluded with a verification.

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The fifth plea was similar to the fourth, except that it was pleaded only to the commission and interest, and alleged that there was an agreement between the copartnership and the defendant for interest at 15*l.* per cent., consisting of 5*l.* per cent. for interest, and 10*l.* per cent., which was to be charged under the colour of commission.

Special demurrer and joinder.

Taprell in support of the demurrer. The fourth plea is bad. First, it is too general, for it does not shew with sufficient certainty that the transaction was usurious within 12 Anne, stat. 2, c. 16. It is not pleaded to any particular sum in the declaration, and does not state how much is for money lent and how much for interest. Again, the amount of the loan is mentioned only under a videlicet, nor is any specific sum stated to have been charged for interest, so that it does not appear how the sum mentioned in the commencement of the plea is made up. As these facts were within the knowledge of the defendant he should have stated them with greater particularity. In 1 *Wms. Saund.* 295 *a*, note (1), 6th ed., a distinction is drawn between actions on information, and pleas in bar, where it is said, "in the latter, it is necessary to set forth the whole matter *pecially*, because it lies within the defendant's own knowledge; but in the former it is sufficient to set forth the corrupt contract *generally*, because an action on information may be brought by a *stranger*," referring to *Hawkins' Pleas of the Crown*, 248, s. 24, fol. ed. So in the same note, at p. 295 *b*, 6th ed. "the defendant must set forth the usurious agreement specially, and how much more than legal interest was agreed to be given." In *Bac. Abr.* tit. "*Usury*," (K.), the same distinction is noticed,

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and it is said, that in pleas "you must set forth the whole matter especially, because it lay within your own privity." In *Hill v. Montagu* (a), a general plea of usury was held ill, Lord *Ellenborough*, C. J., saying "the corrupt contract ought to be particularly set forth, and the usurious interest, that the party may know what to answer;" and *Bayley*, J., said, "the party who pleads a contract must set it out, if he be a party to the contract. It lies as much within the knowledge of the defendant as the plaintiff." A similar remark is made by *Tindal*, C. J., in *Robson v. Fallows* (b), who adds, as a reason, that "the Court should see on the face of the record whether more than 5l. per cent. has been obtained for the forbearance of a sum for a given time." The averment that money was advanced by paying cheques is insufficient; it is not averred what interest should be paid. The plea ought also to have distinguished how much was charged for interest and how much for commission, since the commission may not have exceeded the real value of the trouble. The true principle in these cases is laid down in *Bac. Abr.* tit. "*Usury*," (C.) (c), where a contract is said to be equally usurious, "whether the whole be reserved by way of interest, or in part only under that name, and in part by way of rent for a house, let at a rate plainly exceeding the known value." To bring the contract within this rule, what is excess beyond the real value should have been stated. In *Downes v. Green* (d), Lord *Abinger*, C. R., said, that the Court would never presume that an agreement was corruptly and unlawfully made. *Bedo v. Sanderson* (e), which was there referred to in argument, shews that a corrupt bargain must be set out with certainty, and not generally. A further objection of the same nature is, that it does not appear on this plea that the loans were made in pursuance of the contract; nor is the time from which the alleged usurious interest was to

(a) 2 M. & S. 377, 8.

(b) 3 Bing. N. C. 396.

(c) Vol. 8, p. 317, 7th ed.

(d) 12 M. & W. 481, 490.

(e) Cro. Jac. 440.

run stated. In *Partridge*, *qui tam*, v. *Coutes* (a), it was held, that the day on which the money is lent, though under a *videlicet*, must be proved strictly as laid in the plea. So in *Fox*, *qui tam*, v. *Keeling* (b), Lord *Denman*, C. J., said, "It is clear from the authorities, that time is of the essence of all usurious bargains, and that, in a declaration alleging such a bargain, the date of the usurious contract must be stated, and must be proved as laid, even though under a *videlicet*." These were cases of *qui tam* actions; but the principle is the same. [He referred also to *Stephen on Pleading*, ch. 2, sect. 4, rule 2]. The mode in which the loans were in fact made is also insufficiently alleged. It is stated with a generality which would be insufficient in an averment of the performance of a lawful contract, and a *fortiori* it is insufficient to shew that a contract is illegal; *Com. Dig.* tit. "*Pleader*," (C. 58), (C. 59), and (C. 60).

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Next, the plea is bad for not shewing that the contract is not withdrawn from the operation of the Statute of Anne, by the 2 & 3 Vict. c. 37. The Court will not presume illegality; on the contrary, if the agreement can be supported as legal, the Court will so construe it; *Lewis v. Davison* (c). In *Turquand v. Mosedon* (d), it was held that the averment of the contract being "against the form of the statute," was not a sufficient allegation that it was illegal, and that a replication relying on usury was bad for not alleging either that the contract was made before the 7 Wm. 4 & 1 Vict. c. 80, and 2 & 3 Vict. c. 37, came into operation, or that it was excepted from the provisions of those acts.

Bovill, in support of the plea. As to the first objection, it is not necessary that the plea should shew how much was money lent, and how much interest, &c.; for the plaintiff mentioned but one sum in his declaration, and the plea

(a) Ry. & Moo. 153; S. C. 1
C. & P. 534.

(c) 4 M. & W. 654.

(b) 2 A. & E. 670, 677; S. C.
4 N. & M. 523.

(d) 7 M. & W. 504; S. C. 9

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follows it. Further, the contract is set out with sufficient certainty; for it sufficiently shews that the agreement is illegal, and that is all that is required. With respect to the objection that the plea does not distinguish how much of the sum was to be paid for commission, and how much for interest, it is impossible that it should do so, if the parties did not agree to distinguish them. Indeed, one of the usual circumstances of an usurious contract is, that the usury is so concealed as to escape immediate detection. With regard to the averment of the loan having been made, if the contract be shewn to be illegal, the loan, which is only the carrying of it out, need not be alleged with the same precision. The same remark applies to the want of an allegation of the time when the loan was made, and the precise method of it. [The Court here intimated that they thought the plea stated the contract with sufficient certainty].

The more substantial point, viz., that it is consistent with the plea that the contract was legal within 2 & 3 Vict. c. 37, is completely answered by *Thibault v. Gibson* (a), which in fact decides this case. It was there held, that the statute 2 & 3 Vict. c. 37, does not repeal the 12 Ann. st. 2, c. 16, but takes out of its operation all contracts made usurious by that statute, except such as relate to land; and a count in a *qui tam* action for usury, using the general words of the statute of Anne, was held good, though it did not shew that the contract was one affecting land. The same point came before the Court in *Washbourn v. Burrows* (b), when *Thibault v. Gibson* was cited, and was recognised as containing the true principle, namely, that where a statute creating a penalty contains an exception in the enacting clause, the plaintiff must shew that the defendant is not within the exception; but where the exemption comes by way of proviso, either in a subsequent section or a subsequent statute, it is matter of defence and must be pleaded.

Taprell, in reply. *Thibault v. Gibson* did not infringe

(a) 12 M. & W. 88; S. C. 1
D. & L. 253.

(b) 5 D. & L. 105; S. C. 1
Exch. 107.

the decision of the Court in *Turquand v. Mosedon* (a); for in the latter case the averment of usury was in the declaration in a qui tam action, and the defendant pleaded nil debet by statute; so that the whole question of usury or none was open and a matter of evidence. *Parke, B.* (b), expressly says, that that case was not within the decision in *Turquand v. Mosedon*.

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Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was an action for work and labour, money lent, money paid, interest, and on an account stated.

To this declaration the defendant pleaded several pleas. By the fourth plea he sets up an agreement by the plaintiff and the copartnership represented by the plaintiff, that they should cash the defendant's cheques to any amount not exceeding 1000*l.*, and that, in consideration of their so doing, the defendant should pay them interest at a rate exceeding 5*l.* per cent. per annum, i. e., 10*l.* per cent., partly under the name of commission, and partly under the name of interest. The plea then avers that the copartnership did cash the defendant's cheques, and did charge him such excessive interest, and that the sums so paid in cashing the defendant's cheques are the moneys sought be recovered, as money paid and lent, and that the sums sought to be recovered for work and labour are so charged for the commission stipulated for in the said agreement, and the interest sought to be recovered is the said excessive interest.

The fifth plea is substantially the same, except that it is pleaded only to so much of the plaintiff's demand as relates to interest and commission, and states the agreement to have been a corrupt agreement for interest at 15*l.* per cent., i. e., 5*l.* per cent. under the name of interest, and 10*l.* per cent. under colour of being charged for commission. To these pleas there are special demurrers.

(a) 7 M. & W. 504; S. C. 9 Dowl. 282. (b) 12 M. & W. 93.

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Taprell contended for the plaintiff that the agreement was not set out with sufficient certainty, that it ought to have been shewn how much precisely of the excess beyond 5*l.* per cent. was for usurious interest, and how much for commission; but, as we intimated at the hearing, the answer to this is, that the contract is stated with all the certainty of which it is capable. When parties enter into an usurious contract of this nature, it is studiously done in such a manner as to mix up the interest and commission in one charge, so as to make it impossible to tell how much is attributable to the one head, and how much to the other. The defendant has shewn exactly what the bargain was, and has stated that the agreement for the gross sum to be paid for interest and commission was done colourably, so as to enable the partnership to get more than 5*l.* per cent. This, we think, is all which the defendant could be called on to do.

But the main point relied on by the plaintiff was, that the plea was bad for not having stated, either that the contract was not entered into previously to the 2 & 3 Vict. c. 37, or, if subsequently, that it related to land.

But this objection cannot be sustained. The case is governed by *Washbourn v. Burrows* (a). It was there decided that a party setting up usury as a defence, need only state enough to bring the case within the operation of the statute of Anne; and that is certainly done here.

That statute is still in force, and if the opposite party means to contend that the case is one which is taken out of the operation of the statute of Anne by the statute of Victoria, the burthen is on him to do so. This is the clear result of our decision in *Washbourn v. Burrows*, which governs this case; and the judgment must, therefore, be for the defendant.

Judgment for the Defendant.

(a) 1 Exch. 107.

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In the matter of an Arbitration

November 4.

Between

BRADLEY

and

The LONDON and NORTH WESTERN RAILWAY COMPANY.

[In the Exchequer of Pleas.

Coram *Pollock, C. B., Parke, B., and Alderson, B.*]

IN this case there were cross rules. One had been obtained by Bradley, calling upon the London and North Western Railway Company to shew cause why they should not pay to him two sums of 900*l.* and 239*l.* 9*s.*, pursuant to a rule of Court, dated the 7th of May, 1850, and an award made between the parties.

The other, which had been obtained by the London and North Western Railway Company, called on Bradley to shew cause why the same rule of Court should not be discharged, and the award made between the parties be set aside, upon the ground that the arbitrator had awarded respecting matters over which he had no jurisdiction.

The rule of Court in question was a rule by which a submission to arbitration of a question of disputed compensation between Bradley and the London and North Western Railway Company, under the Lands' Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), was made a rule of Court (*a*).

(*a*) See sect. 36, by which the submission may be made a rule of Court, on the application of either of the parties.

contained a recital of the above notice. The Court refused either to enforce the award, or to set aside the rule of Court or award.

Seem, that to entitle a party to appoint an arbitrator to act for both parties, under the 8 & 9 Vict. c. 18, s. 25, he should first appoint his own arbitrator, and give notice of such appointment to the company before he requests them to appoint their arbitrator.

A., the owner of lands which were required for the purposes of a railway company, gave the company notice (under the 8 & 9 Vict. c. 18, s. 25), that it was his intention to nominate and appoint S. M. as his arbitrator, and that if for fourteen days the company failed to appoint an arbitrator, he would appoint S. M. to act for both parties. The company failing, A. appointed S. M., who made an award in his favour. The appointment of S. M., which was made a rule of Court,

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The rule set out the submission, which, after reciting the circumstances under which the dispute had arisen, stated that Bradley had, under the powers of that act, given notice to the company that he claimed the sum of 1250*l.* from them, and that unless they were willing to pay that sum, or enter into a written agreement for that purpose, within twenty-one days after receipt of such notice, the amount of compensation should be settled by arbitration, according to the provisions of the act; and then proceeded as follows:—
“I, the said T. Bradley, thereby also requested and required the said company to nominate and appoint an arbitrator to act on their behalf in the matter of the said arbitration. And thereby I, the said T. B. did further give notice to the said company, that *it was my intention* to nominate and appoint S. D. Martin, of,” &c., “as my arbitrator in and concerning the matters aforesaid, and that if for the space of fourteen days after the said notice and request, the said company should fail to nominate and appoint an arbitrator to act on their behalf as aforesaid, I, the said T. B. would appoint the said S. D. M. to act on behalf of both parties. And whereas a space of more than fourteen days, and more than twenty-one days has long since elapsed after the said dispute as aforesaid had arisen, and after the said notice and request in writing had been made and served upon the said company, and the said company have for the space of more than fourteen days, and more than twenty-one days after the said dispute had arisen, and after service of the said notice and request upon the said company, failed and refused to appoint any arbitrator in the said matters in dispute; and whereas I, the said T. B. did, by the said notice and request in writing, appoint the said S. D. M. my arbitrator in the matters in dispute as aforesaid: Now I, the said T. B. do hereby, in pursuance of the statute in such case made and provided, appoint the said S. D. M. to act as arbitrator on behalf of both parties in the said matters in dispute.”

Hoggins and *H. Hill* appeared to shew cause against the second rule, and in support of the first; but upon it being stated by the other side that there was an objection in form to the rule of Court of the 7th of May, the Court called upon

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Watson and *Cleasby* in support of the second rule, to shew cause against the first. The authority in the present case of both the arbitrator and the Court, is derived from "the Lands' Clauses Consolidation Act, 1845," (8 & 9 Vict. c. 18). By sect. 25 of that act a power is given to parties who cannot agree as to the amount of compensation to be paid under that or any special act, to appoint an arbitrator, and in case of disagreement it is provided, that "if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matter so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute." If, therefore, one party fails to appoint an arbitrator, the other may appoint for him; but he must appoint his own first. Bradley did not do so. The notice to the company only states an *intention* to appoint Martin, not an actual appointment. It was, therefore, revocable; and as that appears on the face of the rule, the Court has no jurisdiction, and the basis upon which the application to carry it into effect is made, fails. The proceeding is one in invitum, and jurisdiction should appear on the face of the rule; *Rex v. The Trustees of the Norwich and Watton Road* (a).

Hoggins and *H. Hill*, contra. There are two answers

(a) 5 A. & E. 563; S. C. 1 N. & P. 32.

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to the objections raised. First, the appointment is a fact recited in the rule of Court; and if incorrect, it should have been contradicted by affidavit. The recital is consistent with the fact that Bradley did properly appoint the arbitrator. Secondly, it is submitted that the appointment is sufficient. [*Alderson, B.*—That depends upon whether it is necessary that the appointment should be communicated to the other side; if it should, I do not think the appointment can be considered sufficient.] No such communication is necessary. [*Alderson, B.*—There appear to be two conditions precedent required by the act. First, that an arbitrator should have been appointed; secondly, that notice of the appointment should have been given to the other side. *Parke, B.*—The company should have the opportunity of saying whether they will accept the arbitrator appointed.] The section does not in terms require that the name of the arbitrator shall be given to the other side; and as other conditions precedent are mentioned, the rule *expressio unius est exclusio alterius*, applies. At all events, there is sufficient doubt as to the meaning of the section to prevent the Court from setting aside the rule of Court and the award; and it will leave the party to bring an action on the award, so that the opinion of a Court of error may be taken.

POLLOCK, C. B.—The appointment of the arbitrator was not such as was intended by the act. It was not one which could not be revoked; so that if the company were content with the arbitrator, they would be sure of having his services. The rule cannot be enforced, as this objection appears on the face of it.

PARKE, B.—We cannot now set aside the award. The only question is, whether we shall set aside the rule of Court; I think we should discharge both rules without costs.

Rules discharged.

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LYONS v. HYMAN.

November 4.

[In the Exchequer of Pleas.

Coram Pollock, C. B., Parke, B., and Alderson, B.]

A RULE had been obtained, calling upon the plaintiff to shew cause why the judgment signed in this action, together with the taxation of costs and execution, should not be set aside, or why the judgment should not be amended.

Where a Judge has granted a certificate to deprive the plaintiff of costs under the 43 Eliz. c. 6, after judgment signed and execution issued, the certificate, although inoperative, is not void; and the Court will give effect to it under particular circumstances, by setting aside the judgment and execution, upon payment of costs.

The facts, as they appeared upon the affidavits and were admitted by both sides, were as follows. The action was in debt for wages due to the plaintiff as servant of the defendant. It was tried before the Lord Chief Baron, at Westminster, on the 11th of May, 1850, when the jury found a verdict for the plaintiff, with damages 1s. An application was made to the learned Judge at the trial to certify under the County Courts Act (9 & 10 Vict. c. 95, s. 129,) that the action was fit to be brought in a superior Court; and this was granted and indorsed on the postea; but no other certificate was then applied for. On the 29th of May, the plaintiff's attorney delivered to the defendant's attorney his bill of costs, with an appointment to tax on the following day. On the morning of the 30th, judgment was signed, but the costs were not filled up, a blank being left for them. At a later hour on the same day the costs were taxed; and afterwards, at half past three o'clock, execution issued. On the same day, the attorney took out a summons, calling on the plaintiff or his attorney to appear before the Lord Chief Baron, at Westminster, at a quarter before eleven on the next day (the 31st), to shew cause why the learned Judge should not indorse a certificate on the postea under the stat. 43 Eliz. c. 6, s. 2, in order to deprive the plaintiff of costs.

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That summons was served on the plaintiff's attorney on the 30th, but after judgment had been signed and execution issued. The parties appeared by their attorneys before the Lord Chief Baron on the 31st, and his Lordship then certified under the stat. 43 Eliz. c. 6. The amount of the taxed costs was afterwards inserted in the judgment.

Watson and Hawkins shewed cause. The judgment and other proceedings of the plaintiff are perfectly regular, and there is, therefore, no ground for setting them aside. The words of the 43 Eliz. c. 6, s. 2, are, if "it shall appear to the Judges for the same Court, and so signified by the justices before whom the same shall be tried," that the debt or damages do not amount to 40s., then the Judges "*shall not award* for costs to the party plaintiff" a greater sum than the debt or damage recovered. The certificate, therefore, is to be given when the judgment is awarded, and not after. In *Whalley v. Williamson* (a), it was held that a Judge had no power to revoke a similar certificate fourteen months after the trial; and in *Hippesley v. Lang* (b), the Court expressed an opinion that an application for a suggestion to deprive the plaintiff of costs, under a Court of Requests' Act, must be made promptly. *Foxall v. Banks* (c), and *Davis v. Cole* (d), will probably be relied upon on the part of the defendant; but neither of those cases support the position he seeks to establish. In the former, the Judge at the trial intimated his intention to consider whether he would certify or not; and shortly afterwards, when the parties were before him on a summons, expressed his intention to certify. The plaintiff's attorney refused to produce the postea; and the Court, on that ground, allowed the certificate to be indorsed afterwards. In *Davis v. Cole*, the Judge did certify by word of mouth at the

(a) 5 Bing. N. C. 200; S. C.
7 Dowl. 253; 7 Scott, 135.
(b) 4 B. & C. 863.

(c) 5 B. & A. 536.
(d) 6 M. & W. 624; S. C. 8
Dowl. 732.

trial, but the officer neglected to indorse the certificate. That was a mere correction of a misprision of the clerk.

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Bramwell and *Lush*, in support of the rule. It is true, when the certificate was indorsed, judgment had been signed for the debt; but it had not been signed for the costs, which had not been taxed, and a blank was left for them. [*Parke*, B.—The plaintiff was quite regular in signing judgment.] Even so, the Court will set it aside upon payment of costs, in the same way as they set aside judgment signed for want of a plea, upon an affidavit of merits, or to enable a suggestion to be entered to deprive the plaintiff of costs under the County Courts Act; for the defendant has not been guilty of any laches.

PER CURIAM.

Rule absolute for setting aside the judgment
and subsequent proceedings, upon pay-
ment of costs.



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November 5.

FORD v. SIR JAMES GRAHAM, Bart.

[In the Common Pleas.

Coram *Jervis, C. J., Maule, J., Williams, J., and
Talfourd, J.*]

A prisoner who conducts in person an action in which he is plaintiff, is not entitled to a habeas corpus to bring him up to the Judge's Chambers to oppose a summons for leave to plead several matters, unless the Judge, in his discretion, think that there is an urgent necessity for his presence.

A. W. HOGGINS moved for a rule, calling on the defendant to shew cause why an order of *Maule, J.*, giving the defendant leave to plead several matters, should not be set aside.

The action was commenced in June last, and was brought against the defendant, late Secretary of State for the Home Department, for a trespass committed on the plaintiff in removing him against his will from a ward in the Queen's Prison, in which he had been lodged under a *ca. sa.*, to another ward. The defendant having taken out a summons before *Maule, J.*, for leave to plead several matters, the plaintiff applied by counsel to the same learned Judge for a habeas corpus to bring him up to the Judge's Chambers, to shew cause against the summons; and supported the application by an affidavit, stating that he did not intend employing an attorney to conduct the action, and that he had valid objections against the defendant being permitted to plead several matters. His Lordship refused the application; but as the plaintiff had not attended the summons of the defendant, he granted the latter a second summons, and upon hearing it made the order which it was now sought to rescind. The plaintiff's affidavit, after setting forth the above facts, stated that he had not employed any attorney or agent to conduct the action, and he believed that he could, if brought up, shew good cause against the defendant's application for leave to plead several matters.

A. W. Hoggins. Under the circumstances, the plaintiff was entitled to a habeas corpus. He had a right to bring an action, and was not bound to employ an attorney to conduct

it for him. To refuse him the liberty necessary for enabling him to conduct his case was a denial of justice. In *Clarke v. Smith* (a), the Court intimated their willingness to grant a habeas corpus to a prisoner to bring him up, in order that he might be present upon the discussion of a rule, when they saw a necessity for his presence. Here the plaintiff's presence at the Judge's Chambers was clearly necessary. In the present case the Court ought especially to afford its assistance to the plaintiff, as the action was brought in respect of that very imprisonment which disabled him from attending at Chambers.

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JERVIS, C. J.—The question is one altogether for the discretion of the Judge; and unless he saw a very pressing necessity for the plaintiff's attendance at Chambers, he was right in refusing the application.

MAULE, J.—When this case came before me at Chambers, my view of it was this: A person, in prison for debt, brings an action, and then comes to me and says, "Give me a habeas corpus as often as I want it for the purpose of conducting the action." I looked into the authorities, and it seemed to me he had no right to what he demanded. In contemplation of law, a man in prison is put into a situation of considerable inconvenience; and if he was to be let out to conduct his business,—whether that business happened to be an action at law or anything else,—his creditor would have little chance of getting his money. *Clarke v. Smith* shews that there must be some special reason to induce the Court to grant such an application. If we were to grant a habeas corpus in this case, we should next have applications for a habeas corpus to enable a prisoner to go to an election, or a race, or a regatta, or wheresoever else he might have business.

Rule refused.

(a) 3 C. B. 982.

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November 4, 6.

HAWKER, Appellant, v. FIELD, Respondent.

[*Bail Court. Coram Patteson, J.*]

In order to remove into this Court an order of quarter sessions for the purpose of enforcing it under the 12 & 13 Vict. c. 45, s. 18, it is not necessary that a writ of certiorari should issue; the simple order of this Court being sufficient for that purpose.

UNTHANK moved to remove an order of justices in sessions of the county of Warwick, ordering the payment of the costs of an unsuccessful appeal against a bastardy order, into this Court, for the purpose of being enforced as a rule of this Court, under the 12 & 13 Vict. c. 45, s. 18. The officers in the Crown Office conceive that the proper mode of removing an order of quarter sessions into this Court under the above section is by writ of certiorari, and that the order of the Court there mentioned is introduced merely for the purpose of ordering such a writ to issue. It is submitted, however, that that impression is erroneous. The 18th section enacts, that "in all cases where any order shall be made by any Court of general or quarter sessions," "it shall be lawful for the Court of Queen's Bench, or for any Judge of the Court at Chambers, either in Term or Vacation, upon the application," &c., "to order and direct such order" "to be removed into the said Court of Queen's Bench," &c. It is true, that the common law mode of removing a judgment or order of an inferior tribunal into this Court is by a writ of certiorari; but now the statute has directed that the removal shall be effected, in all cases like the present, by an order, which, it is submitted, obviates the necessity and expense of a writ of certiorari. [*Patteson, J.*—In *Reg. v. Justices of Devonshire (a)*, my Brother *Wightman* seems to have thought that the proper mode of proceeding under this section was for the Court to order a writ of certiorari to issue.] The question does not appear to have been much discussed in that case. The stat. 1 & 2 Vict. c. 110, s. 22, enacts, that

(a) *Ante*, p. 520.

where "final judgment shall be obtained" "in any inferior Court of record," and "where any rule or order shall be made by any such inferior Court of record as aforesaid whereby any sum of money," &c. "shall be payable," "it shall be lawful for the Judges of any of her Majesty's superior Courts of record," &c., "upon the application," &c., "to order and direct the judgment," or "the rule or order," &c., "to be removed into the said superior Court," &c. The practice under this statute has been to consider the order of the Court or Judge as sufficient to remove the judgment, &c. into this Court, without any writ of certiorari. It is true, that under the former statute as to removing judgments from inferior Courts (19 Geo. 3, c. 70, s. 4), the practice was to issue a writ of certiorari; but the language of that act was different, enacting that any of the superior Courts should "cause the record of the said judgment to be removed into such superior Courts," &c. Here the Legislature seem to intend that the statutory order should have the same effect as the common law writ of certiorari; and the practice under the 1 & 2 Vict. c. 110, s. 22, where the words are similar, offers a strong analogy.

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PATTESON, J., referred to *Reg. v. Gamble (a)*, cited in a note to *Reg. v. Justices of Devonshire*.

Cur. adv. vult.

PATTESON, J.—I have considered this application and spoken to several of the Judges, and we think that the terms of the act of Parliament are sufficient to introduce a new practice, and that no writ of certiorari is necessary.

Rule accordingly (*b*).

(*a*) 16 M. & W. 384, 395, *et seq.*

(*b*) The 12 & 13 Vict. c. 45, s. 18, enacts, that "it shall be lawful for the Court of Queen's

Bench, or for any Judge of that Court at Chambers, either in Term or Vacation, upon the application of any person entitled

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to enforce such order, and upon the production of a copy of such order under the hand of the clerk of the peace or his deputy, and of proof of refusal or neglect to obey such order, to order and direct," &c. By analogy to the practice under the 1 & 2 Vict. c. 110, s. 22, it would seem that the above motion is more properly the subject of an application to a Judge at Chambers; that it should be made upon the production of a copy of the order of sessions, and on an affidavit verifying the signature of the clerk of the peace thereto. (See *Chit. Forms*, p. 569, forms 6, 7, 8, 5th ed). The affidavit should also, it seems, state the application to

be by or on behalf of A. B., and that he is the person entitled to enforce the order, and that there has been a refusal or neglect to obey it. The "refusal or neglect" can only take place, it is apprehended, after a formal demand, as in cases of attachment; and it is proper that this should be so, as when the order is removed into this Court, if it be for the payment of a sum certain, (and the analogy between the present section and that in the 1 & 2 Vict. c. 110, to the same effect exists), a *fi. fa.* may issue at once against a party's goods, or a *ca. sa.* against his person, without further warning.

November 8.

DUNN v. WEST.

[In the Common Pleas.

Coram *Jervis, C. J., Maule, J., Williams, J., and Talfourd, J.*]

A cause and all matters in difference having been referred to an arbitrator (the

costs of the action to abide the event of the award), he directed that a verdict should be entered for the defendant in the cause, and found that 300*l.* were due from defendant to plaintiff in respect of the matters in difference; he also directed that that sum should be paid by defendant to plaintiff at a certain time and place, at which same time and place he ordered the plaintiff to pay the defendant his costs of the action. The plaintiff having become bankrupt, the defendant paid to the plaintiff's attorneys the difference between the sum which he was ordered to pay, and that which he was to receive.

The Court refused, upon an application by the plaintiff's attorneys, to give effect to their lien by ordering the defendant to pay them the residue.

Pending the arbitration, the plaintiff assigned to his attorneys the debt due to him from the defendant. Whether the attorneys, upon such assignment, lost their lien, *quære*.

defendant, to shew cause why the defendant should not pay to them, the said Messrs. Robinson and Haynes, the sum of 180*l.*, being the balance of a sum of 303*l.* 15*s.*

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The following facts appeared upon the affidavits. The action was commenced in October, 1849, and was brought to recover a sum of 200*l.*, which was to become due upon fixing the first floor of a house erected on the defendant's land at Winchelsea. The defence was, that the first floor was not fixed when the action was brought. At the trial, on the 27th of November, 1849, a verdict was taken for the plaintiff, subject to the award of an arbitrator, to whom the cause and all matters in difference between the parties were referred. By the order of reference it was directed that the taxed costs of the action should abide the event of the award, and that the costs of the reference and award should be in the discretion of the arbitrator. On the 30th of January, 1850, the plaintiff's attorneys gave the defendant notice that their client had assigned to them absolutely the debt due to him from the defendant. On the 20th of February, the arbitrator made his award, and thereby, after finding that the first floor to be erected by the plaintiff had not been completed as in the declaration alleged, he ordered that the verdict for the plaintiff should be set aside and entered for the defendant; and awarded that there was due from the defendant to the plaintiff, in respect of all claims, demands, &c. in respect of the matters in difference, 303*l.* 15*s.*, after allowing the defendant all claims, demands, &c. which he had against the plaintiff; "which said sum of money," the award proceeded to state, "I do hereby award, order and direct shall be paid by the said" defendant "to the said" plaintiff "on the 11th day of March next, between the hours of two and three o'clock in the afternoon of the same day, at the office of Messrs. Robinson and Haynes; and that at the same time and place the said" plaintiff "shall pay Messrs. Church and Langdale, on account of the" defendant, "the costs which, by the

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terms of the order of reference, are to abide the event of my award,—such costs in the mean time to be taxed by the proper officer.” The award then directed that each party should bear his own costs of the reference, and that the plaintiff should pay those of the award. The plaintiff shortly after the date of the award became bankrupt.

The defendant's costs of the action were, on the 28th of March, taxed at 180*l.*; and on the 2nd of April he tendered to the plaintiff's attorneys 123*l.* 15*s.*, the difference between the sum which he was ordered to pay and the amount of his costs. The plaintiff's attorneys claimed the whole of the 303*l.* 15*s.*, alleging that they had a lien upon that sum for the costs due to them by their client, but accepted the 123*l.* 15*s.* in part payment of that sum. On the 13th of April, the order of reference was made a rule of Court, and that rule and the award were, on the same day, served upon the defendant, and a demand was made of 180*l.* The plaintiff's costs of the action were taxed at 145*l.* 1*s.* 5*d.*, and his costs of the reference at 240*l.*

Bramwell shewed cause. The sum which the plaintiff's attorneys now claim was not payable to their client; and it would be unreasonable to hold, that they should be in a better situation than he would have been. They found their claim upon a lien; but a lien can give them no greater right, than that of the person through whom they claim. It is true, the Courts have sometimes interfered to protect the attorney's lien, even where his client had parted with all right to the subject-matter of it. But the ground of their interference has always been that there was collusion between the parties, for the purpose of defrauding the attorney; and the cases, therefore, which establish the principle of the Court's interference on behalf of the attorney, are authorities for the defendant: for they shew that they are founded upon a principle which has no appli-

cation in the present case; *Read v. Dupper* (a); *Ormerod v. Tate* (b); *Welsh v. Hole* (c); *Gould v. Davis* (d); *Swain v. Senate* (e). "The doctrine of an attorney's lien on a judgment," says *Parke, B.*, in *Barker v. St. Quintin* (f), "was first established in the case of *Welsh v. Hole*, where it was held that an attorney has a lien on money of his client in his hands, and that he may retain the amount of his bill; and that if the plaintiff gave notice to the defendant not to pay the money to the attorney, the Court would probably assist him by compelling the defendant to pay the money over again." [*Jervis, C. J.*—In all the cases the money had been paid by the defendant to the plaintiff; and the attorney came to the Court, alleging that the money had been paid in order to cheat him of his costs. Here the money has not been paid.] If the defendant had no right to deduct the sum due to him from that which he owed, the Court might have required him to pay it to the attorney; as in *Domett v. Helyer* (g), where *Patteson, J.*, said, "I cannot allow one judgment to be set off against another, except on the condition of satisfying the attorney's lien."

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In the present case, although the arbitrator had no power to order the plaintiff to allow the costs, which he was to pay to the defendant, to be set off against the sum which the latter was to pay, he might have ordered the defendant to pay the costs immediately, and have postponed the payment of the sum which he was to receive until after the costs had been paid. In this respect the case is distinguishable from *Cowell v. Betteley* (h), where the jurisdiction of the arbitrator was confined to the cause, and did not extend to the matters in difference. It is also distinguishable in another respect: the attorney there merely claimed to use his client's name for the purpose of

(a) 6 T. R. 361.

(b) 1 East, 464.

(c) 1 Dougl. 238.

(d) 1 Tyr. 380; S. C. 1 Dowl.
288; 1 C. & J. 415.

(e) 2 N. R. 99.

(f) 12 M. & W. 441, 451; S. C.

1 D. & L. 542.

(g) 2 Dowl. 540, 1.

(h) 10 Bing. 432; S. C. 4 M.
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giving effect to his lien; but here the plaintiff's attorneys claim from the defendant a sum of money which he never was bound to pay to their client, and they propose to enforce that claim, not through any process in their client's name, but by proceedings in their own. Their right, if any, is founded upon a lien, and can only be enforced in the name of their client. If the defendant were ordered to pay them this money, and the plaintiff were afterwards to sue upon the award, the payment under the rule of Court could not be pleaded in bar of his action, as it might be, if the payment were made under an execution in the plaintiff's name, and the Court will not place the defendant in such a difficulty. [*Jervis*, C. J., referred to *Figes v. Adams* (a).]

But further, the attorneys have no lien in this case. The chose in action upon which they claim it, has been assigned to them, and therefore their lien is gone; for a man cannot have a lien on his own property. [*Maule*, J.—There was here an actually litigated debt. The assignment of choses in action has been much favoured in modern times, and the doctrine of maintenance is considerably narrowed. If, however, an assignment can be made of a chose in action pending the litigation, there is an end to the doctrine of maintenance.] If it be objected that a chose in action is not assignable, and that it is, therefore, in contemplation of law, still vested in the plaintiff, it may be retorted that neither in strict law can there be a lien upon a chose in action; for lien implies a possession of the thing upon which it attaches, and a chose in action, as its name implies, cannot be in the possession of any one.

Channell, Serjt., and *Lush*, in support of the rule. The award gives the defendant a legal right to the verdict, and the plaintiff a legal right to 303*l.* 15*s.* The arbitrator had no power to make any order respecting the payment of the costs of the action. [*Maule*, J.—But it was competent for

(a) 4 Taunt. 632.

him to postpone the payment of the 303*l.* 15*s.* until the costs were paid.] If each party had brought an action for the sum awarded to him, and had recovered judgment, one judgment could not have been set off against the other, to the prejudice of the attorney's lien: and the same rule ought to be applied where the rights of the parties are acquired under an award. The case, therefore, comes within the principle acted upon in *Cowell v. Betteley* (a); *Caddell v. Smart* (b); *Domett v. Helyer* (c); and *Doe d. Swinton v. Sinclair* (d). If the award of the arbitrator amounts to a direction to set off one sum against the other, it is bad; for he had no authority to make such an order. When *Figes v. Adams* (e), was decided, there was a difference in the practice of the Courts, with respect to the lien of attorneys. The Court of Queen's Bench upheld it; the Common Pleas disregarded it; and in the Exchequer the practice was not fixed. For the purpose of establishing uniformity in the practice, the 93rd rule of Hil. Term, 2 Wm. 4 (f), was passed. *Cowell v. Betteley*, decides that that rule applies to awards; and the present is substantially the same as that case. [*Jervis, C. J.—Holcroft v. Manby* (g) shews that the attorney should proceed by action in the name of the client.] Then the set-off might be pleaded, and the attorney's lien be lost. [*Williams, J.—*That only shews that the Court has not machinery to protect the attorney.] The lien is protected by a rule of Court, and the Court will make that protection effectual. It is to be observed that in *Holcroft v. Manby*, the case of *Cowell v. Betteley*, was not cited. [*Jervis, C. J.—*What we are asked to do is not to protect the attor-

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(a) 10 Bing. 432; S. C. 4 M. & Scott, 265; 2 Dowl. 780.

(b) 4 Dowl. 760.

(c) 2 Dowl. 540.

(d) 5 Dowl. 26; S. C. 3 Scott, 42.

(e) 4 Taunt. 632.

(f) "No set-off of damages or costs between parties shall be

allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought; provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted."

(g) 7 M. & G. 843; S. C. 2 D. & L. 319.

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ney's lien, but to treat them as parties in whose favour an award has been made. *Maule, J.*—What right have we to order the defendant, who has chosen a tribunal for deciding a dispute between himself and another person, to pay to a different person what he has been ordered to pay to his opponent?] The practice of the Court authorizes it to do so, for the purpose of giving effect to the lien. [*Jervis, C. J.*—What course would the plaintiff's attorney have pursued before the 1 & 2 Vict. c. 110?—would he have moved for an attachment? *Williams, J.*—It appears from the report of *Cowell v. Betteley*, in *Moore and Scott's Reports*, that the only question in that case, was as to suing out execution. The rule there granted was “that execution may issue for the costs of the first action notwithstanding the award” (a).] That case shews at all events, that the Court entertained an application to set aside an award, by a person who was not a party to it, because it interfered with his lien. And in all cases where the attorney has applied for the interposition of the Court for his protection, the proceeding has been taken in his name.

Even if there has been such an assignment of the debt to the attorneys as a Court of law can recognise, they have a right to have the sum they now demand paid to them. If the costs due to them by the plaintiff had fallen short of 180*l.*, the assertion made on the other side that they must claim under the assignment, would be well founded; but, in fact, the costs owing to them much exceed that amount. The payment of 123*l.* 15*s.* by the defendant to the plaintiff's attorneys, was in effect, a payment to them by their client; and as it was not, at the time of payment, appropriated to the discharge of any particular portion of their claim on him, they have a right to appropriate it to any portion they please. They accordingly appropriate it in payment of their client's costs of the reference; which will leave 116*l.* 5*s.* still due to them. [*Jervis, C. J.*—Upon the plaintiff's bankruptcy the defendant might have applied

(a) 4 M. & Scott, 265, 68.

for security for costs, and might have compelled the present applicants, as the assignees of the debt, to give their own personal security.]

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JERVIS, C. J.—I am of opinion that this rule must be discharged. It appears that the action, while pending, was referred, with liberty for the arbitrator to determine all matters in difference. He disposes of the action by directing a verdict to be entered for the defendant; and awards 303*l.* 15*s.* to be paid to the plaintiff, and that on the same day, and at the same place, the costs of the action shall be paid by him to the defendant. No application was made to set aside the award. The arbitrator does not direct a set-off, as he had no authority to do so. Application is now made,—not by the person to whom it was ordered that the money should be paid,—but by his attorney, for an order on the defendant to pay in obedience to the award; and the ground on which the application is made, is the 93rd rule of Court of Hil. Term, 2 Wm. 4. Now, I understand the origin of that rule to have been this: formerly, if an application was made in the Queen's Bench to set off the damages and costs in cross actions, it was never done without protecting the attorney's lien. In this Court, it appears from *Figes v. Adams* (a), that it had been the uniform practice to disregard the lien; a practice which Lord Eldon, in the case of *Hall v. Ody* (b), condemned; and the Court of Exchequer, in this conflict, was left in a state of uncertainty. The rule of Court alluded to was in consequence, made. It must, therefore, be construed with reference to the circumstances under which it was made, and the object it had in view. Now, no application is made here to set off one demand against another; but we are called on to draw an inference from the rule, and to say that under no circumstances there shall be a set-off. And we are asked to make a party pay a sum of money to a

(a) 4 Taunt. 632.

(b) 2 B. & P. 28.

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person to whom he was not ordered to pay it. I do not advert to the difficulties which might arise with reference to the assignment, and the other matters referred to in the course of the argument. It is sufficient to say, that we are called upon to decide that no set-off is to be allowed in any case, on an analogy which is sought to be drawn from a rule of Court which does not apply in this case.

MAULE, J.—I am of the same opinion. If an action were brought for the money in the name of the plaintiff, and a set-off pleaded, then, unless the attorney's lien were a good replication to a plea of set-off, I do not understand why we should enforce this claim. No such order was ever made before. The only case on the subject is that which has been cited, and which is altogether distinguishable. The proper course for the attorneys was to make provision in the order of reference, by giving jurisdiction to the arbitrator to give effect to their lien. But the attorneys are without a lien here. A lien is a right by no means of a universal kind, but arises only by way of qualification on the practice of allowing an equitable set-off, which cannot be enforced as between two executions. If A. have a judgment against B., and B. a judgment against A., the one might enforce his judgment, though the other had no means of satisfying his. The Court in that case permits a set-off. But when one of the parties applies to the Court for that purpose, the Court will not give its assistance without protecting the lien of the attorney. When, however, no such application is made, the Court has nothing to do with the attorney's lien.

WILLIAMS, J.—I am of the same opinion. The object of the present application is, in effect, to enforce payment by an attachment; for if this rule were made absolute, and were not complied with, it might be enforced by attachment. In other words, we are asked to attach the defendant for contempt, for not paying money according to an award; the disobedience consisting in not paying a particular sum

of money which has not been awarded to the parties applying. It is said that the case is identical with *Cowell v. Betteley* (a), and that the Court ought to protect the attorneys as in that case. I can only say, that if the same equity existed in both cases, they differ in this respect, that in *Cowell v. Betteley* the Court had machinery to protect the lien of the attorney, while here it has not.

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TALFOURD, J.—I also think that this rule must be discharged. I cannot see any jurisdiction in the Court to make the order now asked. The rule of Court under which it is sought to support the present application, is a rule which appears to have been made for the purpose of directing the exercise of the discretionary power which the Court possesses under certain circumstances. Unless those circumstances exist, the Court has no jurisdiction; and it is sufficient to say, that they do not exist in the present case.

Rule discharged with costs.

(a) 10 Bing. 432; S. C. 4 M. & Scott, 265; 2 Dowl. 780.

NURDIN v. FAIRBANKS.

November 9.

[In the Exchequer of Pleas.

Coram *Pollock, C. B., Parke, B., Alderson, B., and Platt, B.*]

JOYCE moved for a rule to shew cause why all proceedings in this action should not be stayed upon payment of the debt recovered without costs; or why the judgment pleaded, except as to 8*l.* 14*s.* 6*d.* never indebted, and to that sum a tender, and the jury found for the plaintiff on the first issue to the extent of 16*s.*, and for the defendant on the plea of tender, the Court refused to stay the proceedings as in an action brought for a sum under 40*s.*; but left the plaintiff to enter a suggestion under the County Court Act (9 & 10 Vict. c. 95, s. 129).

Where a plaintiff sued in a superior Court for 9*l.* 10*s.*, and the defendant

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should not be set aside, and the plea roll brought in to enter a suggestion to deprive the plaintiff of costs, under 9 & 10 Vict. c. 95, s. 129.

It appeared upon the affidavits that the action was for debt, and the particulars shewed that the plaintiff sought to recover 9*l.* 10*s.* The defendant pleaded, first, except as to 8*l.* 14*s.* 6*d.* *nunquam indebitatus*; secondly, to that sum, a tender of 8*l.* 14*s.* 6*d.* The cause was tried by writ of trial before the Secondary of London, and the jury found for the plaintiff on the first issue to the extent of 16*s.*, and for the defendant on the plea of tender. The affidavit contained the usual averments, negating the exceptions of the 128th section, to shew that the cause was within the jurisdiction of the Mary-le-bone County Court of Middlesex.

Joyce. With regard to the first alternative of the rule, the question is, whether the Court will not stay the proceedings on account of the smallness of the sum for which the plaintiff brings his action. In *Stutton v. Bament (a)*, this Court held that the practice of the superior Courts of staying proceedings in actions brought for less than 40*s.* was not affected by the County Courts Act. Here, the only sum in truth in issue, was 16*s.* [*Parke, B.*—When the writ was sued out it was for the whole sum, including the amount tendered.] If the sum tendered had been accepted, the action would have been for 16*s.* only; and the plaintiff should not be in a better position because he refused the tender. His acceptance of the sum tendered would not have precluded him from recovering the residue in the County Court.

POLLOCK, C. B.—According to your argument, if the plaintiff was originally a creditor for more than 50*l.*, the debtor, by tendering a portion of that sum, would deprive the plaintiff of his right to sue in a superior Court. That cannot be so.

(a) 6 D. & L. 632; S. C. 3 Exch. 831.

PARKE, B.—The action was brought for the whole amount of 9*l.* 10*s.*, and not for a sum within 40*s.* On that point, therefore, there must be no rule; on the second point you may take a

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Rule nisi.

REGINA on the Prosecution of GRAY v. MALLINSON.

November 11.

[*Bail Court. Coram Patteson, J.*]

CLEASBY moved, on behalf of one Gray, that he should be sworn to certain articles of the peace against John Mallinson, that the articles be read and filed, and that an attachment should issue against John Mallinson.

This case differed from ordinary applications of the same nature, in this respect, that the applicant did not swear generally that he went in fear of bodily harm from the defendant, but only that if he went to certain premises in Huddersfield, in Yorkshire, in which he and the defendant carried on business together as partners, he was in fear of bodily harm from the defendant.

Articles of the peace are sufficient which state an apprehension of bodily harm, if the exhibitant goes to a certain place to which he has a right to go, —such as premises where he and the defendant carry on business in partnership;—although it does not appear that if he refrains from going there, he is in any fear of bodily harm.

Cleasby. This case comes within the principle upon which such applications are usually granted. In almost every instance the exhibitant would have a difficulty in swearing that he was in fear of bodily injury if he remained in his own house. But it is necessary that he should go about his lawful affairs, and, therefore, it is sufficient if he swears that he goes in fear of bodily harm on such occasions. Here, Gray has a right to go to the premises where the partnership business is carried on; and although, if Mallinson turn him out, another remedy may be the appropriate one to determine his right to do so, he

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is not to be [prevented by such means as the present from going there to oppose, by any legal means in his power, the collection of partnership debts, or the disposal of the partnership assets. [*Patteson, J.*—Is there any case in which an application has been granted under circumstances similar to the present, where the applicant has merely sworn that he is in fear of bodily harm if he goes to a particular place?] There is no case similar to the present, but in most cases if the exhibitant stayed in his own house and locked the doors, he could not swear he was in fear of bodily harm.

PATTESON, J.—The exhibitant shews that he has as much right to go to these premises as the defendant; and that he cannot go there for fear of the defendant's doing him some bodily harm. It is true that he does not state he is in this fear if he does not go to the premises in question, and in point of fact he probably cannot safely swear that; but I think the case, notwithstanding, comes within the principle upon which articles of the peace are granted, and therefore the attachment must issue.

Rule accordingly (*a*).

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| <p>(<i>a</i>) The defendant, who resided in Yorkshire, was, by the terms of the rule, to be at liberty</p> | <p>to put in bail, himself in 400<i>l.</i>, and two sureties in 200<i>l.</i> each.</p> |
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REGINA *v.* The JUSTICES OF MIDDLESEX.

November 11.

[*Bail Court. Coram Patteson J.*]

A RULE had been obtained in last Trinity Term, calling upon the justices of Middlesex to shew cause why a mandamus should not issue, commanding them to enter continuances and hear an appeal of the overseers of the poor of the township of Leeds against an order of removal of a pauper from the parish of St. Marylebone to that township.

A notice of appeal against an order of removal may be given by the attorney of the overseers on their behalf.

Unless an objection to a notice of appeal be distinctly raised at the sessions, a party cannot avail himself of it, on an application to this Court for a mandamus.

Upon the appeal coming on for trial at the Middlesex Quarter Sessions, on the 29th of April in the present year, the appellants proved the following notice of appeal:—

“To the Churchwardens,” &c. “of the parish of St. Marylebone, in the county of Middlesex.”

“Gentlemen,

“As attorney acting for and on behalf, and at the request and by the direction of the overseers of the poor of the township of Leeds,” &c., “I do hereby give you notice, that they do intend at the next general quarter sessions” “to enter an appeal against a certain order,” &c. “As witness my hand this 28th of January, 1850. Yours, &c.

(Signed) “CHAS. NAYLOR,

“Attorney acting for and on the behalf of the overseers of the poor of the said township of Leeds.”

The respondents objected that this notice was not sufficient within the 9 Geo. 1, c. 7, s. 8, being signed, not by the overseers of the appellant township, or the majority of them, but by their attorney. The sessions allowed the objection, and refused to hear the appeal; upon which the present rule was obtained.

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Huddleston shewed cause. The sessions were right in refusing to hear this appeal. The question turns upon the 9 Geo. 1, c. 7, s. 8, which requires that "reasonable notice" of the appeal shall be "given by the churchwardens or overseers of the poor of such parish or place, who shall make such appeal, unto the churchwardens or overseers of the poor of such parish or place from which such poor person," &c. "shall be removed." It is submitted, that these words require that the notice should be given by the churchwardens and overseers themselves, or by a majority of them, and not by an attorney acting on their behalf. Similar words are to be found in the 13 & 14 Car. 2, c. 12, s. 1, which authorizes the justices to remove a pauper "upon complaint made by the churchwardens or overseers of the poor of any parish," &c.; and in the 4 & 5 Wm. 4, c. 76, s. 79, which requires a notice of chargeability to be sent by post or otherwise "by the overseers or guardians of the parish obtaining such order." Under the first of those statutes, the complaint must be made by the churchwardens or overseers themselves, and not by any other person (a). In *Reg. v. The Inhabitants of Catteral* (b), where the complaint was laid as "the information and complaint of R. R., assistant overseer," this Court doubted whether the sessions might not at once treat the complaint as made without authority, and on that ground quash the order of removal, or whether they might receive evidence to shew that the assistant overseer was in fact authorized to lay the complaint. *Patteson, J.*, there asks, "Is there any case shewing that the complaint may be made by the attorney of the overseers; by a person employed to represent them?" In *Rex v. The Inhabitants of Kimbolton* (c), where it was held that the grounds of appeal under 4 & 5 Wm. 4, c. 76, s. 81, must be sent to the overseers, and not to their attorney; *Littledale, J.*, in giving judgment, says: "I think the statement should be

(a) See per *Holt, C. J. Weston Rivers v. St. Peter's*, 2 Salk. 492.

(b) 5 Q. B. 901, 4.

(c) 6 A. & E. 603, 9; S. C. 1 N. & P. 606.

delivered to the overseers themselves, and that it is not enough that it should be delivered to the attorney. It is clear that, under sect. 79, a notice sent by the attorney would not be enough; for it is to be sent by three or more of the guardians." "By stat. [U. K.] 41 Geo. 3, c. 23, s. 4, notices of appeal are to be signed by the person giving the same, or his attorney on his behalf; but they are to be delivered to, or left at the abodes of, the churchwardens and overseers, or any two of them. Here we see the Legislature recognising the distinction between the party giving the notice, and the party receiving it; the notice may be given by the attorney, but not received by him: where no distinction is expressed, I think the rule must be uniform." When the Legislature intends that a notice of appeal shall be sufficient if given by attorney, it expresses that intention in distinct terms, as in 12 & 13 Vict. c. 45, s. 1. The case of *Rex v. Justices of Salop* (a) may be distinguished from the present, as here no attempt was made to prove a parol notice of appeal. The real object of the statute was, that the overseers should decide upon the propriety of appealing, without first seeking the advice of an attorney in the matter. [He referred also to *Rex v. Justices of Surrey* (b).]

Secondly, even if a notice by attorney were sufficient, no proof was offered to the sessions that the person giving the notice was the attorney of the appellant parish, or was authorized to give the notice.

Hall and *Pashley*, in support of the rule. A notice of appeal given by the attorney of the appellant parish is sufficient. The statute does not prescribe any form of notice, but only requires that a notice shall be given "by the churchwardens," &c.; and in ordinary practice where acts of Parliament require a notice to be given, it may be given by attorney. In *Rex v. Justices of Salop*, the Court held a parol notice of appeal sufficient under 49 Geo. 3, c. 68, s. 5,

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(a) 4 B. & A. 626.

(b) 5 Q. B. 506.

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which empowers a person aggrieved to appeal, “on giving notice to such justices,” &c. “of his intention of bringing such appeal, and of the cause and matter thereof.” *Bayley, J.*, there says (a), “An appeal is usually allowed by statute on certain conditions; and when one of those conditions is, that the party appealing shall give a notice of his appeal, it would be to add a further condition, if we were to hold that such notice must be in writing.” Under the stat. 13 Geo. 2, c. 18, s. 5, which enacts that no writ of certiorari shall issue, unless the “party,” &c. “suing forth the same hath” “given six days’ notice thereof in writing to the justice or justices,” &c., it is the constant practice for the attorney to give the notice on behalf of the applicant; and in *Reg. v. Justices of Lancashire* (b), an objection that the notice was given by the attorney, and not by the party, was overruled. In all acts of Parliament which give an appeal upon notice, a notice by attorney is sufficient, when it is not otherwise expressed; but the rule is different as to the person to whom it is to be given: there the attorney is not the agent to receive the notice, unless expressly so appointed. The case of *Rex v. The Inhabitants of Kimbolton* (c), therefore, does not apply; and the opinion expressed by *Littledale, J.*, in giving judgment, is extra-judicial, and has reference to the particular wording of the section then under consideration, which required the notice to be sent “by three or more” of the guardians. [They referred also to *Rex v. Inhabitants of Abergele* (d); *Reg. v. Inhabitants of Cartworth* (e); and *Reg. v. Inhabitants of Darton* (f).]

The second objection cannot now be taken, as it was not raised at the sessions, when the appellants might have called witnesses to prove that the attorney was duly authorized by the appellants to give the notice on their behalf.

(a) *Rex v. Justices of Salop*,
4 B. & A. 629.

(b) 11 A. & E. 144; S. C. 3 P.
& D. 86.

(c) 6 A. & E. 603, 9; S. C.
1 N. & P. 606.

(d) 5 A. & E. 795; S. C. 1 N.
& P. 235.

(e) 1 D. & L. 837; S. C. 5 Q.
B. 201; 3 G. & D. 162.

(f) 2 D. & L. 492.

PATTESON, J.—The question turns on the validity of the notice of appeal, and two points might certainly have been raised in the present case: first, whether a notice of appeal given by the attorney of an appellant parish is sufficient; and, secondly, if so, whether the attorney was duly authorized to give the notice. The second of these points, however, I think, does not arise, as it was not taken at the sessions. In order to come to this Court upon such a point, it should be shewn that the objection was clearly and distinctly taken at the sessions. It does not appear that that was the case in the present instance; and I therefore think that objection fails.

The point to be decided, therefore, is reduced to the simple question whether a notice of appeal given by an attorney on behalf of an appellant parish, is sufficient. No case has been cited in which the question has arisen under this act of Parliament, but the general maxim has been relied on, “qui facit per alium, facit per se,” which ordinarily enables a man to give a notice by attorney or agent.

The cases cited by Mr. *Huddleston* have turned on the words of the act of Parliament. The complaint and notice of chargeability are properly the acts of the overseers and guardians, who know all the facts; and the act of Parliament says that the notice is to be given by them, “or any three or more of such guardians” (*a*). No doubt, language is used in those cases which might be carried further. When once, however, a party has got into litigation, either here or at sessions, the intervention of an attorney is almost necessary. In the case of *Reg. v. The Inhabitants of Kimbolton* (*b*), *Littledale*, J., says, that he thinks it “clear that, under sect. 79” the 4 & 5 Wm. 4, c. 76, “a notice sent by the attorney would not be enough;” but the dicta attributed to a learned Judge, when the point is not raised before him, must not be pressed too far; and when the point is raised, we must

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(*a*) 4 & 5 Wm. 4, c. 76, s. 79.

(*b*) 6 A. & E. 603, 9; S. C. 1 N. & P. 606.

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recur to first principles for our guidance. I can see no reason why, where a notice of appeal is required by act of Parliament to be given by churchwardens or overseers, it should not be as good if given by their attorney as by the churchwardens or overseers themselves; but I can see a difference where the question is to whom the notice is to be given, for in the latter case it is difficult to say, if no previous proceedings have been taken, that the parties have an attorney. I therefore think that the sessions were wrong in refusing to hear this appeal, and that the rule for a mandamus must be absolute.

Rule absolute (a).

(a) The same point was decided in the full Court in *Reg. v. The Inhabitants of Carew*, 13th November, 1850.

November 11.

ABLEY v. DALE.

[In the Common Pleas.

Coram *Jervis, C. J., Maule, J., Williams, J., and Talfourd, J.*]

An order of the Judge of a County Court, made upon a summons after judgment, under the 9 & 10 Vict. c. 95, s. 99, ordering that the defendant shall pay an instalment of a judgment debt upon a future day, or, in default, be committed, is invalid.

TRESPASS for assault and false imprisonment in the House of Correction for the county of Middlesex.

Plea. 'That before, &c., to wit, on the 1st of June, 1847, the defendant and one George Cornelius Dale, levied their plaint in the Whitechapel County Court of Middlesex, against the plaintiff for 13*l.* 3*s.*, then, and within the jurisdiction of the said Court, due and owing by the plaintiff to the defendant, and G. C. D. The plea, after stating the proceedings in the plaint, averred, that the defendant and G. C. D. recovered judgment for the debt and costs amounting together to 15*l.* 10*s.*, payable by monthly instalments of 15*s.*, the first to be paid on the 16th of July, 1847; that the plaintiff

paid under the judgment small sums amounting altogether to 2*l.* 7*s.* 4*d.*, but made default as to payment of the residue; that afterwards, to wit, on the 20th of May, 1849, the defendant, and G. C. D., caused the plaintiff to be summoned to appear at the Court on the 31st, to answer such questions as should be put to him touching his estate and effects, and the manner and circumstances under which he had contracted the said debt, and as to the means, &c. (following the language of the 98th section of the County Courts' Act); and that the plaintiff appeared, and was examined by the Judge touching those matters. "And thereupon it then appeared to the satisfaction of the said Judge of the said Court, and it was then adjudged by the said Court, upon the said examination, that the now plaintiff had sufficient means and ability of discharging the said sum of 12*l.* 12*s.* 8*d.*, when the same became due under the said order, and that he still had sufficient means and ability of discharging the same; and it was thereupon then at the said Court, adjudged and ordered by the said Court, that the now plaintiff should pay the said sum of 12*l.* 12*s.* 8*d.*, together with 1*l.* 13*s.* 8*d.*, for the costs of the last mentioned summons, and the proceedings therein, according to the statute in that behalf, amounting, in the whole, to the sum of 14*l.* 6*s.* 4*d.*, by instalments of 10*s.* every month, the first instalment to be paid on the second of July, then next; or that the now plaintiff be committed for the term of twenty days to the House of Correction for the county of Middlesex in the Cold Bath Fields, in the said county, according to the form of the statute," &c. The plea then averred, that afterwards and before the said time, when, &c., to wit, on the 2nd of August, 1849, two of such last mentioned instalments became due; that the plaintiff neglected to pay; and that thereupon, the said sum of 14*l.* 6*s.* 4*d.* remaining due, afterwards and before, &c., to wit, on the 17th of August, the defendant, and G. C. D., caused to be sued out, and there was then in due form of law issued out of the said Court, according to the form of the

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statute, &c., a warrant under the seal of the Court directed to the high bailiff, and other bailiffs of the Court, &c. The plea then justified under a warrant which ordered the plaintiff's commitment to the House of Correction for Middlesex, for twenty days.

Special demurrer and joinder.

Lush, in support of the demurrer (*a*). The substantial objection to the plea is, that the Judge of the County Court had no power to make an order requiring the defendant to pay, and ordering that in the event of his not paying in pursuance of the order, he should be committed. *Ex parte Kinning* (*b*), is in point; for although in that case there was, in the first instance, merely an order after judgment to pay, and a warrant of commitment was afterwards issued upon the defendant's default, while in the present case the order is to pay, and in default, to be committed; yet in both cases there is the same violation of the principle of law, that a man shall not be punished without having an opportunity of being heard in his defence. [*Jervis*, C. J.—In *Ex parte Kinning* it was for the Judge, here it is for the gaoler to decide whether the defendant made default.] In *Kinning v. Buchanan* (*c*), the same question was raised by plea; and the Court adhered to the view it had adopted in *Ex parte Kinning*. [*Maule*, J., referred to *Rex v. The Chancellor, &c. of the University of Cambridge* (*d*), and *Capel v. Child* (*e*).]

H. Hill contra. The authorities cited on the other side are not in point. In *Ex parte Kinning*, the defendant appears to have been only once before the Court, viz. upon

(*a*) Several objections to the plea were raised by the demurrer; but the only one relied upon is that reported in the text.

(*b*) 4 C. B. 507.

(*c*) C. P. Trin. Term, 1849,

cited from 18 Law Journ., C. P. 332.

(*d*) 1 Stra. 557; S. C. 8 Mod. 148; 2 Ld. Raym. 1334.

(*e*) 2 C. & J. 558.

the hearing; the Judge then merely ordered that he should pay the debt by instalments; and the defendant was afterwards committed, without further notice, for not paying in obedience to the order. Here the defendant was summoned to the County Court: he attended; and the Judge ordered him to pay by instalments. He made default in payment, and was then summoned under the 98th section of the 8 & 9 Vict. c. 95, which provides that a judgment creditor may summons his debtor before the Judge of the district within which the latter lives; and if he appears, the Judge may examine him touching his estate and effects, and touching the manner and circumstances under which he contracted the debt, and as to the means and expectation he then had, and as to the property and means he still hath of discharging the said debt, and as to the disposal he may have made of any property. This summons is the only means which the Judge has of bringing a party before him after judgment: and if his order for payment made upon hearing such summons, be disobeyed, he has no means of calling the defendant before him to answer for such default. Nor is it necessary that he should have such means; for according to the rules of practice regulating the County Courts, all payments under the judgment of the Court, must be made into Court and not to the party; so that the Judge can see, from the records of his Court, whether any default has been made and takes judicial notice of it. [*Maule, J.*—The 100th section authorizes the Judge “to rescind or alter any order that shall have been previously made against any defendant so summoned before him for the payment” “of any debt or damages recovered, and to make any further or other order, either for the payment of the whole of such debt or damages and costs forthwith, or by any instalments, or in any other manner as such Judge may think reasonable and just.” When he makes that amended order, surely the debtor is in the same situation as a person who has an original order made against him. But even if the Judge has no power to compel the defend-

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ant to come into Court, still the question is, whether he should not give him an opportunity of coming.] Here the defendant was heard; the Judge found that he was of ability to pay by certain instalments, and ordered him to be committed if he did not pay them. The Judge might have ordered his immediate commitment, for the defendant had incurred that penalty: and the warrant in effect only postpones the commitment to a future day, with the merciful view of enabling the defendant to avoid the punishment by payment. [*Maule, J.*—It is quite contrary to all analogy in law, that a Judge shall have the power to say; “you shall pay on a future day, and if not, be committed.” If the order was to pay forthwith, otherwise to be committed, the case would be different. But the ground of the decision in *Ex parte Kinning (a)*, was, that notwithstanding the defendant’s non-payment, circumstances might possibly happen between the making of the order and the time of imprisoning the defendant, which might induce the Judge to say that he would not commit him. Suppose, for instance, the man were in the last stage of cholera when the time for payment arrived, should he not have an opportunity of making that fact known to the Judge, before being committed for non-payment?] The Legislature has not contemplated bringing up the defendant a second time, and has made no provision for that purpose. [*Maule, J.*—There is nothing in the act which shews that the Legislature intended to repeal the common law, which says, that a man shall not be punished without being first heard. *Jervis, C. J.*—If the Judge makes an amended order, why may not the plaintiff summon his debtor again? He has still an unsatisfied judgment.] The defendant had already incurred the punishment of imprisonment when this order was made. [*Maule, J.*—The order here is not to commit the defendant for a past disobedience; but the Judge says; “you must pay on the 1st of July, and I adjudicate

(a) 4 C. B. 507.

beforehand, that there cannot possibly be any excuse to prevent your paying on that day.”] It has been held that under the 6 & 7 Wm. 4, c. 71, s. 82,—which provides, that in case a rent-charge shall be in arrear for forty days, and there shall be no sufficient distress on the premises, a Judge may, on affidavit of the facts, order a writ to be issued to the sheriff of the county, requiring him to summon a jury to assess the arrears—a Judge might grant an order *ex parte*, and that no previous summons or notice to the parties was necessary; *In re Hammersmith Rent-charge* (a). [Maule, J.—That was civil process; here a man is to be punished with a discretionary amount of punishment. Whenever a punishment is discretionary, the Court must have before it all the circumstances which are to regulate its discretion. That is the reason why a Court of error cannot award any punishment. Now, can a Judge determine beforehand, that a breach which is to take place at a future time, is to be visited with a certain amount of punishment? The Judge is here claiming a prophetic power. Suppose the defendant were called upon to answer for his default, and said; “I have paid all but sixpence, and I was on my way to pawn my shirt to raise that sixpence, when I was attacked by thieves, who took it from me;” would the Judge in the exercise of his discretion visit him in such a case, with the same amount of punishment as if the default was without excuse?]

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JERVIS, C. J.—I am of opinion that the plaintiff is entitled to judgment. It seems to me that the Court is bound by the case of *Ex parte Kinning*, relied upon by Mr. Lush. It is true that case is not precisely the same as this, but it proceeds upon the principle that it is contrary to natural justice to punish a man without giving him an opportunity of defending himself. It does not follow from this, that if the act of Parliament did say positively

(a) 7 D. & L. 41; S. C. 4 Exch. 87.

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that the man should be committed without being heard, we should not give effect to it; but the statute, when examined, bears no such construction. A party having an unsatisfied judgment is empowered by the 98th section to summon his debtor. [His Lordship here read the 98th section of the County Courts' Act.] Then the 99th section gives the Judge the power to commit in seven cases, and I see that my Brother *Manning*, in a note to the case of *Ex parte Kinning (a)*, has divided the section into seven heads. The seventh head is as follows:—
“If it shall appear to the satisfaction of the Judge of the said Court, that the party summoned has then or has had since the judgment obtained against him, sufficient means or ability to pay the debt, or damages, or costs so recovered against him, either altogether (meaning probably ‘in one sum’) or by any instalment or instalments which the Court in which the judgment was obtained, shall have ordered; and if he shall refuse or neglect to pay the same, as shall have been so ordered, or as shall be ordered pursuant to the power hereinafter provided, it shall be lawful for such Judge, if he shall think fit, to order that any such party may be committed,” &c. Now, the debtor had, at the time when he was brought before the Court, refused to pay according to the terms of the order; and thereupon the power of the Judge attached to commit him. It does not follow, however, that he had the power to commit him at a future period, in the event of some contingency happening; and inasmuch as the language of the statute is consistent with the general rule of law that a party is not to be committed without being heard in his defence, I see no ground for straining the words of the section for the purpose of giving the Judge such a power. It is obvious that circumstances might happen which would afford a good excuse for not obeying the order; and it is just that the party should have an opportunity of stating them.

(a) 4 C. B. 507, 514.

MAULE, J.—I quite agree. It is not necessary to go into the grounds of my opinion, especially as the Lord Chief Justice has already stated them, and as I expressed in the course of the argument the difficulties which I felt. I conceive that the plaintiff's right to proceed under an order obtained under the 98th section is the same as if he had obtained a new judgment. I do not, however, decide the case upon that ground, but upon the general one, which it is most important to uphold, that a person is not to be punished without having an opportunity of defending himself. That is a general principle of law. No doubt an act might be passed inconsistent with it, but that is not very likely; and unless it contained words which shewed clearly such an intention, we ought not to draw any inference to violate those principles of law and practice which, as said by one of the Judges in *Dr. Bentley's case* (a), are common to the laws of both God and man.

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WILLIAMS, J.—I was not one of the Judges who took part in the decision of *Ex parte Kinning*, but I concur in the judgment in that case, and in the general principle of law laid down in it. I think we could not decide this case otherwise than we now do, without abandoning a most important principle.

TALFOURD, J.—When a Judge of the County Court makes an order to pay by instalments, he does in effect say that it is not fitting that the defendant should pay all at one time. The very object of the order is to make the payments subject to all the contingencies which may happen at a future time.

Judgment for the Plaintiff.

(a) Per *Fortescue*, J., 1 Stra. 567.

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HOOPER v. WOOLMER.

[In the Common Pleas.

Coram *Jervis, C. J., Maule, J., Williams, J., and
Talfourd, J.*]

A declaration, after setting forth an agreement by which defendant took of plaintiff certain rooms, part of a messuage, and agreed to pay (without saying to whom) "the proportion of the rates," &c. "which might be assessed on the premises so taken" by him, averred, that afterwards, rates amounting, to wit, to 150*l.*, were assessed on the messuage, being the rates whereof the proportion was

ASSUMPSIT. The declaration stated, that the plaintiff and defendant on the 18th of August, 1847, signed an agreement, which was set out verbatim, and by which the defendant, after agreeing to take of the plaintiff, certain rooms, being part of a messuage in Serjeants' Inn, Fleet Street, from Midsummer, 1847, for a year, at the rent of 40*l.* agreed "to pay the proportion of rates, taxes, and assessments" "which then were or thereafter might be assessed, on the premises *so taken by the said*" defendant. The declaration after averring mutual promises, and the defendant's entry upon the premises, alleged "that while the defendant was tenant of the premises, to wit, &c., divers rates, taxes and assessments, amounting, to wit, to 150*l.*, were respectively assessed on the *said messuage* in the agreement mentioned, and whereof the demised premises are parcel, being such rates," &c., "whereof the proportion agreed to be paid as aforesaid; that such rates were afterwards assessed, became due, and were paid by the plaintiff; that the proper proportion payable by the defendant was a certain proportion, to wit, one-third, amounting, to wit, to 50*l.*, of all which defendant had notice, and was requested by the plaintiff to pay the said sum, nevertheless defendant disregarded, &c.

Pleas. First, as to 12*l.* 10*s.* tender and payment into Court.

Secondly, as to residue, traverse of the request to pay.

Fourthly, as to residue, that the proper proportion payable by defendant was a certain proportion, amounting to 12*l.* 10*s.*, without this, that the proper proportion was a certain proportion, to wit, one-third, amounting, to wit, to 50*l.*

Held, upon special demurrer to the second and fourth pleas,

First, that the defendant was bound to pay his proportion of the rates to the plaintiff.

Secondly, that his liability to do so was a primary, and not a collateral liability; and, therefore, that no request to pay was necessary.

Thirdly, that under the agreement to pay a proportion of the rates assessed on the premises so taken by him, he was bound to pay a proportion of the rates assessed on the messuage, of which such premises were a part. And

Fourthly, that the fourth plea was bad, as traversing only the precise amount of the proportion stated in the declaration, which was immaterial.

was so agreed to be paid as aforesaid; that the said rates, &c., so assessed, afterwards and before the commencement of this suit, to wit, on the 2nd day of July, A. D. 1847, and on divers other days, &c., became due, and were paid by the plaintiff, to the several persons authorized to collect them; "that the proper and reasonable proportion of the said last mentioned rates," &c., "to be paid by the defendant in respect of the said demised premises, was a certain proportion or part thereof, to wit, one-third part thereof, amounting, to wit, to the sum of 50*l*. : of all which the defendant before the commencement of this suit, to wit, on the 27th day of March, A. D. 1850, had notice, and was then requested by the plaintiff to pay the said last mentioned sum of money, as and for and then being such proportion of the said last mentioned rates," &c., "as was to be so paid by the defendant, according to the form and effect of the said agreement as aforesaid;" that nevertheless, the defendant disregarded, &c., and had not paid the said sum of 50*l*., or any part thereof, or the said proportion, or any other part, share, or proportion of the last mentioned rates, &c.

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The declaration also contained counts for money paid and upon an account stated.

Pleas. First, as to 12*l*. 10*s*., parcel of the 50*l*. in the first count mentioned, tender and payment into Court.

Second, as to the residue of the said sum of 50*l*., and all causes of action in respect thereof, that the defendant was not requested by the plaintiff to pay the said residue of the sum of 50*l*., modo et formâ, &c.

Fourth, as to the residue of the said sum of 50*l*., and all causes of action in respect thereof, "that the proper and reasonable proportion of the said rates," &c. "to be paid by the defendant in respect of the said demised premises was a certain proportion, amounting to the sum of 12*l*. 10*s*., and no more; without this, that the said proper and reasonable proportion of the said rates," &c. "was a certain proportion or part thereof, to wit, one-third part thereof, amounting, to wit, to the sum of 50*l*," modo et formâ, &c.

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Special demurrer to the second and fourth pleas, and joinder.

Couch, in support of the demurrer. 'The second plea is bad, for putting in issue matter not alleged, nor material to be alleged, in the declaration. The declaration alleges that rates were made, and that the defendant had notice thereof; and it is no answer that the defendant was not requested by the plaintiff to pay; *Wallis v. Scott* (a); *Hill v. Wade* (b). [*Maule, J.*—The defendant promises to pay for the premises a rent consisting of a certain sum, and of a further sum to be ascertained by the amount of taxes imposed upon the house. As soon as that amount was ascertained, it was his duty to pay.]

The fourth plea also puts in issue immaterial matter. The declaration avers that the proper proportion of the rates was a certain proportion, to wit, one-third, amounting, to wit, to 50*l.*; and the plea states the proper proportion was a certain proportion amounting to 12*l.* 10*s.*, without this, that the proper proportion was, to wit, one-third, amounting, to wit, to 50*l.* This traverse in fact puts in issue, not the fact whether the proportion was one-third, but only whether the sum was 50*l.*, which is immaterial.

Needham (*Hodgson* with him). The declaration is bad in substance. It is not averred that any rates were assessed on the premises taken by the defendant, and the promise is limited to such assessments. Further, although the promise is made to the plaintiff, it is not a promise to pay him; the defendant is bound to pay the party entitled to the rate.

But if the plaintiff's construction is correct, the defendant's liability is not to pay his own debt, but a debt of the plaintiff: that is a collateral liability, and a request is necessary. The request is, therefore, properly put in issue by the second plea, and the demurrer must fail; *Birks v.*

(a) 1 Stra. 88.

(b) Cro. Jac. 523.

Trippett (a). [*Williams*, J.—There the agreement was to pay on request, using the very words.] In *Batson v. Spearman* (b), no such words were in the agreement, and yet the request was held material.

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As to the fourth plea, the traverse follows the language of the declaration; and if there be any ambiguity in it, the fault lies with the plaintiff, and not with the defendant. Indeed, the plea is more intelligible than the declaration, as it explains by the inducement what is meant by the traverse. [*Maule*, J.—The plaintiff is not bound to prove the precise proportion; but he is bound to prove that the defendant had notice of the proportion, and that is the meaning of the averment in the declaration.] The form of the breach shews that he intended to make the precise amount material, for it says, that the defendant did not pay “the said sum of 50*l*.” [*Maule*, J.—That is, the sum already described, incorporating all the “to wits.” It was not necessary for the plaintiff to state any sum. He does not say that the sum is 50*l*.; he merely says that the defendant had notice of the sum. *Talfourd*, J.—The breach is not merely that the defendant did not pay the precise sum, but it goes on, “or any part thereof, or the said proportion, or any other part, share,” &c. “of the said rates,” &c.] How is the defendant to put in issue the proportion? [*Maule*, J.—Assuming it to be material, he might deny that he had notice of the proportion; and if the proportion of which the plaintiff had given him notice proved not to be the true proportion, the averment in the declaration, that the plaintiff had given him notice of the proportion, could not be proved.]

JERVIS, C. J.—I am of opinion that the plaintiff is entitled to judgment. First, as to the second plea. That raises the question whether, under the terms of the contract, a request was necessary. Upon the state of facts as they

(a) 1 Saund. 32.

(b) 9 A. & E. 298; S. C. 3 P. & D. 77.

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appear on the record, it is manifest that the rent payable for the chambers is the amount of the rent mentioned in the agreement, plus the proportion of the rates which should be assessed upon the premises taken by the defendant; which must clearly mean the same proportion of the whole rate as the chambers bear to the whole house. The record shews that rates were assessed upon the premises; that the plaintiff paid a large sum of money; and that the defendant became liable to pay a proportion of it. The question is, whether that is a primary or a secondary liability. I apprehend it is a primary liability; for the agreement is to pay for the chambers a certain amount of rent, plus a proportion of the rates. If so, no request was necessary.

With respect to the fourth plea, the traverse puts in issue the exact proportion; and it is clear that the plaintiff would be entitled to judgment, unless the proportion were material, which it is not.

MAULE, J.—I am of the same opinion. The declaration shews an agreement to pay a certain proportion of the rates by way of rent, without saying to whom. The declaration then goes on to shew what rates were assessed and paid by the plaintiff, and alleges that notice of that, and of the due proportion, was given to the defendant. I think that shews, without any allegation of request, a liability upon the defendant to pay. In fact, when the plaintiff paid the money, there arose a debt from the defendant to the plaintiff; and no demand was necessary, unless some demand was provided for in the agreement. In the case of goods sold and delivered, it may, no doubt, be agreed that the money shall not be payable until after demand: the point has often arisen in cases in bankruptcy, in which the liability of the joint or separate estates has turned upon the question whether a demand has been made or not, with reference to a proviso that a demand should be necessary, without which stipulation no demand would have been

necessary. Here, I think that this debt was payable without request; and, therefore, that the plea puts in issue an immaterial allegation.

The other plea, as I understand it—and it is difficult to understand it—puts in issue the precise amount of the proportion. I do not think the plaintiff is bound to prove the precise amount. The declaration states that the defendant had notice of the amount of his due proportion, and avers that that was so much. It may be that notice to the defendant of his due proportion was material. I rather incline to think it was; but I am by no means certain of it: because, if the defendant had notice of the whole amount of the assessment, and what it was in respect of, he had as good means of knowing what his proportion was, as the plaintiff. But that question is not material here, because the plea seeks to raise an issue which ought to have been raised in another way. If the defendant sought to dispute the amount, he ought to have done so by paying what he conceived the amount into Court.

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WILLIAMS, J., and TALFOURD, J., concurred.

Judgment for the Plaintiff.

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PRESCOTT and Others v. HADOW.

[In the Exchequer of Pleas.]

Coram *Pollock, C. B., Parke, B., Alderson, B., and
Platt, B.*]

A creditor of a joint stock company who has sued an individual shareholder, and whose action has been stayed under sect. 73 of the Winding-up Act (11 & 12 Vict. c. 45), may continue his action so soon as he has proved his claim before the Master, although he has taken no further steps to enforce his claim under that act.

ROCHFORD CLARKE had obtained a rule, calling on the plaintiffs to shew cause why an order made by *Maule, J.*, dated the 26th of July, 1850, should not be set aside.

It appeared upon the affidavits that this was an action of assumpsit, and that the defendant was sued as a shareholder of the Royal Bank of Australia. On the 25th of March, 1850, an order was made by Vice Chancellor *Bruce*, under the Joint Stock Companies' Winding-up Act, 1848, (11 & 12 Vict. c. 45), for winding up that company. On the 25th of April an official manager was duly appointed, and on the 15th of June an order was made by *Alderson, B.*, directing that proceedings in the plaintiffs' action should be stayed until after they had "made or exhibited their proof" before the Master. On the 17th, the plaintiffs' attorney carried in and exhibited the plaintiffs' claim before the Master appointed to wind up the affairs of the company, who, after hearing counsel on behalf of the plaintiffs and defendant, on the 2nd of July allowed the claim. On the 9th of July, the plaintiffs having taken out a summons, the parties appeared before *Maule, J.*, who made the order now sought to be set aside, by which he ordered that the cause should be tried in its turn, and that the stay of proceedings entered in the Marshal's book in accordance with the order of *Alderson, B.*, should be withdrawn.

Bramwell shewed cause. The question depends upon

the construction of the 73rd section of the Joint Stock Companies' Winding-up Act, under which the order of *Alderson, B.*, was made. That section provides, that after the appointment of an official manager no person may, except as the Master permits, commence or proceed with any action against a person who is sued as "contributory" of the company, "until after proof, or exhibiting or making such proof as he may be able, of his debt or demand before the Master, as herein-after mentioned;" and that a Judge of the Court in which the action is brought may order "that all further proceedings in such action shall be stayed until after such proof shall have been made or exhibited before the Master." This action having been so stayed the plaintiffs did prove before the Master, and were then entitled to proceed with their action. Indeed, the order of *Maule, J.*, would have been unnecessary, if the Marshal had not required some authority for putting the cause in the list for trial. It must be contended, on the part of the defendant, that the effect of the first order is to stay proceedings for ever. [*R. Clarke.* I contend that the true construction of the act is, that "until after proof," &c. means, until the plaintiffs have taken some reasonable step to obtain payment of the claim beyond the mere exhibiting it before the Master.] How can the Court say what is reasonable in each case? To adopt such a construction would be to extend the plain meaning of the words of the act, which the Court will not do, unless there be manifest necessity for doing so. [He was then stopped by the Court who called on]

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R. Clarke, in support of the rule. Undoubtedly, the words in their literal meaning are satisfied by the mere production of the evidence of the claim before the Master; but words must sometimes be construed differently from their ordinary meaning, in order to give effect to the intention of the Legislature. "Execution levied," "goods for exportation," and "persons in insolvent circumstances," are

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expressions which have been held to bear different meanings in different acts, according to the context. So here, if the words "until after proof," &c. are construed strictly, the intention of the Legislature will not be carried out. The general objects of the act were twofold,—to provide a fund for payment of the creditors, and to give a protection to the contributories of such companies. The defendant is sued as a shareholder; but as the Master has allowed the plaintiffs' claim, the defendant will be called upon to contribute to the fund for its payment, and it is, therefore, not just or reasonable that he should continue personally liable in an action. The word "exhibiting" clearly cannot be understood in its literal meaning; nor should the word "proof;" which must mean "effectual proof." [*Pollock*, C. B.—The plaintiffs have at common law a right of action; that cannot be taken away by implication. All that the act requires is that he shall make such proof as he is able; he has done so, and the Court cannot require him to do more.] The Joint Stock Companies' Act, 7 & 8 Vict. c. 110, which is in *pari materiâ* (*a*), requires that diligence should be used by a creditor to obtain payment from the company before he can resort to a shareholder. [*Pollock*, C. B.—In that act there is an express provision to that effect. If we were to hold it necessary here, we should be legislating, and not merely putting a judicial construction on the act.] To hold that the words "exhibiting or making such proof" mean that the plaintiffs should take reasonable steps to enforce their claim before proceeding in their action, would be no great extension of the meaning of the words. [*Pollock*, C. B.—It is impossible to say what are reasonable steps. What the plaintiff is to do in each case must depend on the particular circumstances of the case. *Parke*, B.—How could an order be made that the action should be stayed until the plaintiffs have taken "reasonable steps?"] In *Thompson v. The Universal Salvage Company* (*b*), *Parke*, B., said, with

(*a*) Sect. 66.

(*b*) 3 Exch. 310, 318-9; S. C. 6 D. & L. 465.

reference to the 11 & 12 Vict. c. 45, "So long as there is a reasonable prospect of obtaining payment by proving the debt under the provisions of that act, it is our duty to prevent individual creditors from having execution against the shareholders of the company," (under the 7 & 8 Vict. c. 110, s. 66.) *Alderson*, B., also said, "It would be very unjust, and not a fair construction of the 7 & 8 Vict. c. 110, that a creditor should proceed against an individual shareholder, when he has a right to go against the assets of the whole company. When he has done so without success, he may again resort to the individual." [*Alderson*, B.—The application in that case was to our discretion. Here the Court has no discretion; we can only follow the words of the act, which allow a stay of proceedings only till the "proof" before the Master.]

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POLLOCK, C. B.—The question is, whether we are to stay proceedings on the part of the plaintiffs, they having proved their demand before the Master under 11 & 12 Vict. c. 45, s. 73, but taken no further steps to recover it under that act. Even in the absence of sect. 58, I should have had no doubt that the case came within the general rule, that a statute is never to be held to take away a common law right of the subject, unless it is clear that such is the intention of the Legislature; but by sect. 58 I find, that "except as is by this act expressly provided," nothing therein, nor any petition or order under it, shall "diminish, prejudice, or in anywise alter or affect the rights or remedies of creditors, or other persons not being contributories," nor "any actions, suits, or other proceedings" pending at the date of the petition. The defendant, therefore, must shew, not only that it is reasonable, but that the act actually expresses what he contends for. It certainly is not expressed, and, I think, not intended.

PARKE, B.—The question turns entirely on the words of

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sect. 73, which enacts, that the action shall be stayed “until after proof, or exhibiting or making such proof as he may be able, of his debt or demand before the Master.” That means that before the creditor can be allowed to go on with his action, he must have given all the proof he can before the Master, and the Master must have allowed his claim. Nothing further is required by the act; and when that is done, the order of the Judge is at an end. The effect of this is, that a proof is given by which the Master may know the number and extent of the creditors: having learnt this, he may go on with the proceedings under the act. This being the plain meaning of the act, I see nothing in it which should induce us to depart from the general rule and put a different construction on the words. *Thompson v. The Universal Salvage Company* (a) was a different case. That was an application under 7 & 8 Vict. c. 110, and there the Court, having a discretion to exercise, said they would not allow the plaintiffs to issue execution against a shareholder until he had made every attempt to obtain satisfaction from the company first. Here we have no such discretion. The rule must, therefore, be discharged.

ALDERSON, B.—I entirely agree with what has fallen from my Brother *Parke*, except that I doubt whether any allowance of the proof by the Master is necessary, in order to enable the plaintiffs to continue their action, as no mention of any such allowance is made in sect. 73, although in the two following sections a power to allow or disallow is given to the Master for other purposes. That, however, makes no difference here, as both the proof and allowance have been completed, after which, to stay proceedings any longer would be to go beyond the provisions of the act.

PLATT, B.—I am of the same opinion. The course

(a) 3 Exch. 310; S. C. 6 D. & L. 465.

adopted in *Thompson v. The Universal Salvage Company* is not confined to the case of insolvent companies only; for had the company been solvent, the Court would still have required the plaintiff to shew that the return of nulla bona to the fieri facias issued against the goods of the company was true, and that the plaintiff had used due diligence in endeavouring to get his claims satisfied out of the funds of the company. In the present case I think the words of the statute are clear, and that there is no difficulty in their construction.

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Rule discharged.

BULLOCK v. JAMES JENKINS, sued as HENRY BENTINCK. November 13,
14.

[*Bail Court. Coram Patteson, J.*]

THIS was a rule calling upon the plaintiff to shew cause why two orders made by *Platt, B.*, bearing date the 28th of October, and the 2nd of November, 1850, should not be rescinded, and why the defendant should not be discharged out of custody as to this action.

Upon an application to the Court to rescind a Judge's order for holding the defendant to bail, under the 3rd section of the

1 & 2 Vict. c. 110, no other affidavits can, in general, be used than those which were before the Judge when he made the order.

Therefore, fresh affidavits cannot be used, on an application of this kind, to shew either that the plaintiff has no cause of action, or that the defendant was about to quit the country.

But fresh affidavits may be used on an application under the 6th section to discharge the defendant out of custody, although a previous application has been made to a Judge at Chambers under that section.

Where the affidavit on which the order to hold to bail is granted, discloses a cause of action for unliquidated damages only, it should specify the amount of damage sustained by the plaintiff, *Semble*.

Where, however, a Judge had granted an order to hold to bail upon an affidavit which did not contain such a statement, the Court refused to rescind the Judge's order, or to discharge the defendant out of custody; as the Judge might have been satisfied upon the facts stated in the affidavit that the plaintiff had sustained damage to the amount for which he ordered the defendant to be held to bail.

An affidavit to hold to bail in an action for criminal conversation with the plaintiff's wife, stated that she had been taken away from the plaintiff about two years ago, and that the plaintiff had only recently discovered that she had been living ever since with the defendant in adultery; but omitted any positive averment that she was the plaintiff's wife when she was taken away, or that the defendant had committed adultery with her: *Held* sufficient.

Where an order has been made to hold a defendant to bail, it is not necessary that the affidavit upon which it was made should shew that a writ of summons has been first issued; as the Court will intend that the fact was proved to the satisfaction of the Judge.

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The following facts appeared upon the affidavits. On the 28th of October in the present year, the plaintiff obtained the first mentioned order of *Platt, B.*, for holding the defendant to bail for 500*l.* on an affidavit, which stated:—"That deponent has a legitimate and proper cause of action against the defendant for criminal conversation with the wife of deponent. That deponent is the husband of Mary Bullock, formerly," &c. "That deponent's said wife has, for more than two years past, been stolen away from the protection of this deponent, and from his young children. That deponent has sought her many thousand miles through the kingdom, and has expended in the search of her from 400*l.* to 500*l.* That deponent has only recently discovered that she has, for more than two years past, been living under the protection of and in adultery with the above named defendant, and that she is still living with the said defendant." The affidavit then stated that the defendant had threatened, if an action were brought against him, to go abroad and take the plaintiff's wife with him; and that "deponent believes, unless defendant be restrained or forthwith apprehended," he will do so. "That deponent has sustained great damage and injury, not only in the loss of the comfort, solace, and society of his said wife, and his young children in the loss of the maternal, parental, and personal duties, and comfort and protection of their mother for the last two years past, (the performance of all of which personal duties have for more than the last two years past been imposed on this deponent), but in the great expense which the deponent has incurred and been necessarily put to with his three young children in search of her during the last two years past, and being kept out of and taken away from all professional and other duties and business during that period, and to the manifest great damage and injury of deponent, his prospects and professional business, and his prospects for ever hereafter through life." A writ of *capias* having

issued, under which the defendant was arrested, he took out a summons to rescind the order of the learned Judge, upon the ground that he was not about to quit the kingdom. This summons also was heard and opposed before *Platt*, B., who made an order dismissing the summons, the costs to be costs in the cause, but reducing the amount of bail from 500*l.* to 300*l.* A deed of separation made between the plaintiff and his wife of the one part, and one S. V. Favell of the other part, dated the 6th of July, 1850, was proved before the learned Judge. The present rule was obtained, upon the affidavits used before the Judge, and also upon additional affidavits.

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Wilkins, Serjt., and *Lush*, shewed cause. There are several objections to this application. First, the defendant is precluded from coming to the Court to rescind the Judge's order; for it is a rule of practice that a party who applies to a Judge to rescind his own order cannot afterwards have his decision reviewed by the Court. Secondly, he cannot, at all events, upon such a motion, use fresh affidavits. Under the old practice, where a Judge's order was necessary to authorize an arrest, as *ex gr.* in actions of trover, the defendant could not move to set the order aside on counter affidavits. It will be said, however, that the 6th section of the 1 & 2 Vict. c. 110 (*a*), authorizes this application; but that section only applies to the latter

(*a*) Sect. 6. "That it shall be lawful for any person arrested upon any such writ of *capias* to apply at any time after such arrest to a Judge of one of the superior Courts," &c., "for an order or rule on the plaintiff in such action to shew cause why the person arrested should not be discharged out of custody; and that it shall be lawful for such Judge or Court to make

absolute or discharge such order or rule, and to direct the costs of the application to be paid by either party, or to make such other order therein as to such Judge or Court shall seem fit; provided that any such order made by a Judge may be discharged or varied by the Court, on application made thereto by either party dissatisfied with such order."

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branch of this rule, and not to the former, which must succeed or fail upon the materials that were before the Judge when the order was made. Under that section the defendant, when arrested, may either apply to a Judge or the Court; and if he applies to a Judge in the first instance, he may come to the Court afterwards to review the Judge's decision; but the act does not authorize, in such a case, a departure from the ordinary practice, which precludes the use of fresh affidavits.

As to the first branch of the rule, therefore, the question is, whether the affidavit upon which the Judge made the order was sufficient. The affidavit, it is true, does not contain any express averment that the plaintiff has sustained damage to an amount of 20*l.*; but it discloses sufficient facts to satisfy the Judge, that that amount of damage at the least has been sustained; and that is enough. All that the 1 & 2 Vict. c. 110, s. 3, requires, is that the plaintiff shall "show to the satisfaction of a Judge of one of the said superior Courts, that such plaintiff has a cause of action against the defendant" "to the amount of twenty pounds or upwards, or has sustained damage to that amount." Even before that act, a Judge's order was necessary to authorize an arrest in an action like the present, and the form given in *Tidd's Forms*, p. 105, 4th ed. of an affidavit to hold to bail, in an action of trespass for assault on board a ship, omits any averment of the amount of damage sustained. [*Patteson, J.*—In a later edition of the same work (*a*), I find that such a statement is introduced,—“and thereby he, this deponent, has sustained damage to the amount of pounds at the least.”] The only question is, whether the Judge is satisfied of the fact. In some actions as in trover for taking goods, the plaintiff may properly be required to swear to the value of the goods; but in an action like the present, the best course he can pursue, is to make an affidavit of the

(a) *Tidd's Forms*, p. 76, 7, 8th ed.

facts and leave it to the Judge to say to what amount he has sustained damage. Here he states that he has expended 500*£* or 600*£* in searching for his wife, which may be special damage; but, whether it be or not, he has stated all the facts of the case, and shewn to the satisfaction of the Judge, that he has sustained damage to the amount of 300*£*; and it is submitted that the Court cannot, upon the affidavit, see that the Judge was wrong in coming to that conclusion. No case decides that it is necessary, under all circumstances, to state the amount; and it is submitted, therefore, that there is no ground for interfering with the Judge's order. [They referred to *Haddewee v. Catmur* (a).]

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Bovill and *Garth*, in support of the rule. It is admitted that upon the motion for rescinding the order of the learned Judge, the case must stand or fall upon the affidavit on which the order was granted. But as regards the discharge of the defendant out of custody, it is submitted that fresh affidavits may be used. In 1 *Chit. Archb.* 701, 8th ed., the rule on applications of this kind is thus stated: "Where a Judge has made an order at Chambers, and on a second application, has refused to rescind it, an affidavit on which" [a rule] "to rescind that order is obtained, need not mention the second application, except to account for the delay in applying to the Court for the rule;" and for this *Thomas v. Evans* (b) is cited. In *Gibbons v. Spalding* (c), where a similar objection was made under similar circumstances, the Court of Exchequer decided that fresh affidavits might be used on both sides on coming to the

(a) *Barnes*, 61.

(b) Cited from 12 *Law Journ.*, Exch. 41, N. S.; reported in 9 *M. & W.* 829. The order in that case, however, was merely an order to stay proceedings, and

not an order to hold to bail.

(c) 11 *M. & W.* 173; S. C. 2 Dowl. 746, N. S. See also *Graham v. Sandrinelli*, 4 *D. & L.* 317; S. C. 16 *M. & W.* 191.

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Court. In *Pegler v. Hislop* (a), the Court decided that affidavits might be used denying the plaintiff's cause of action; which is going further than the old practice warranted.

The affidavit, however, on which this order has been made is insufficient; and the case of *Hopkins v. Salambier* (b) shews that the proper course, under such circumstances, is to move to set aside the Judge's order. The plaintiff should pledge himself by oath that he has sustained damage to the amount of 20*l.* at least, in order to hold the defendant to bail. The form in the later edition of *Tidd's Forms* (c), and that given in *Chitty's Forms* (d), contain a statement to that effect. The present affidavit does not even contain an averment of the plaintiff's belief,—as in *Hodgson v. Dowell* (e),—that he has sustained damage to that amount. The plaintiff's claim ought to be stated with the same particularity and precision as in a declaration; *Babnanno v. May* (f). In *Lush's Practice*, 592, it is laid down: "In respect of clearness or certainty, the language of the affidavit is tested by the same rules as a declaration which is specially demurred to; and if upon any construction of it the arrest will appear unlawful, the affidavit is defective." The affidavit here does not state that the plaintiff's wife was his wife when she was taken away from him; non constat, therefore, that he did not marry her since. There is no positive averment that the defendant committed adultery with her; and that fact can only be gathered by inference.

PATTERSON, J., then stated that he would hear the case on the additional affidavits.

(a) 1 Exch. 437; S. C. 5 D. & L. 223.

(b) 5 M. & W. 423; S. C. 7 Dowl. 493.

(c) Page 76, 7, 8th ed.

(d) Page 226, 5th ed.

(e) 6 Dowl. 344; S. C. 3 M.

& W. 284.

(f) 6 Dowl. 306.

[The case was then discussed upon the question of the existence of a cause of action, and of the defendant's intention to quit the country.]

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Cur. adv. vult.

On the following day,

PATTESON, J., delivered judgment.—This was a rule to shew cause why a Judge's order to hold to bail, which was reduced as to the amount of bail by a subsequent order, should not be rescinded, and why the defendant should not be discharged out of custody as to this action.

The rule consists of two parts. The first depends on whether the order was right, under the circumstances in which it was made; and that depends upon whether the affidavit was sufficient to justify the order. In judging whether that order was properly made, I cannot look at any other affidavits than those that were before the Judge when he made the order. I take it to be quite clear that, on an application to rescind a Judge's order to arrest a party it is not competent for the party seeking to set it aside, to produce affidavits on collateral matter not submitted to the Judge. I do not mean to say that no case can arise in which an affidavit not produced before the Judge may not be used on an application to this Court to set aside his order. Such an affidavit might perhaps be admissible, for instance, to shew that something took place before the Judge at the time when the order was made, which might explain the making of the order;—although, as it is an *ex parte* proceeding, it is not very probable that such a case should arise. I am, however, quite clear that no new affidavit of collateral matter can be received for the purpose of rescinding the order, either to shew that no cause of action existed, or that the defendant was not about to quit the country; but I also think that these facts may well be received on an application to discharge the defendant out of custody. Therefore, upon the first branch of the rule, I must look only at the affidavit which was before my Brother *Platt*, on the motion for the rule nisi.

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An objection was taken that it did not shew that a writ of summons had been issued, without which the Judge had no jurisdiction to make the order; but it is not necessary that this should appear upon the plaintiff's affidavit; and I think I must take it, that the fact was proved before the Judge, as, unless it had been proved to his satisfaction, he would not have made the order. Indeed, I refused the rule as to this point.

The principal objection relied on was, that the plaintiff did not swear that he had sustained damage to any specified amount. The present is one of those cases in which even before the statute, a Judge's order would have been required to hold the defendant to bail. Very few cases are to be found in which such an order was granted in actions for unliquidated damages before the statute, except where the defendant was about to leave the country. The form of an affidavit to hold to bail in an action of assault, is to be found in *Tidd's Forms*; and it is curious, that in the earlier edition of that work (*a*) no amount of damages is stated. In a later edition (*b*), however, that omission is supplied: whether because it was thought necessary by the learned author of that work or ex abundanti cautela, I know not. There can be no doubt, however, that it is better that such a statement should be inserted; and in deciding this case I by no means wish it to be understood that I consider such a statement unnecessary, except under the particular circumstances of this case. Probably, if the point had been brought under my Brother *Platt's* attention, he would have desired the party to amend the affidavit before he granted the rule.

I have considered the matter a good deal, and also the peculiar language of the affidavit; and bearing in mind that the late act of Parliament only requires that it shall be shown "to the satisfaction of the Judge," "that such plaintiff has a cause of action" "to the amount of twenty pounds or upwards, or has sustained damage to that amount," without saying that the amount shall be "sworn to;" I think that the omission of a specified amount in the present case,

(*a*) *Tidd's Forms*, p. 105, 4th ed.

(*b*) *Id.* p. 76, 7, 8th ed.

does not justify me in holding the affidavit to be insufficient.

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Then I must look at the affidavit to see whether enough is stated in it to satisfy the Judge that the plaintiff had sustained damage, for which the defendant ought to be held to bail. [His Lordship here read the affidavit.] It is not sworn that he had reason to believe that the defendant was the person who took his wife away; if it were, perhaps the 500*l.* or 600*l.* which he says he expended in searching for her for the last two years, might be recoverable as special damage. Whether that would be so or not, however, it is not necessary to decide; for I do not think, that looking at the whole of this affidavit together, I can say that the learned Judge ought not to have been satisfied, that the plaintiff had sustained damage above 20*l.*

It was said, that there was no positive averment that the wife of the plaintiff was his wife, when she was taken away from him two years ago, but I do not think there is any thing in that objection, or in the other which was taken, viz., that there was no positive statement of the defendant having committed adultery with her. I have had an opportunity of speaking to some of the other Judges, and upon the whole I am satisfied, that these objections to the affidavit cannot prevail; and that the learned Judge was entitled, with this affidavit before him, to order the defendant to be held to bail. That part of the rule which seeks to rescind the Judge's order, therefore, cannot be made absolute.

As to the other part,—which seeks the discharge of the defendant from custody,—it comes before the Court not so much by way of appeal against the Judge's order, as in the nature of a substantive separate application, upon which, although the party has been before the Judge for the same purpose, new facts may be brought before the Court. Several cases decide this; and indeed in the last case, in the Court of Exchequer (*a*), the Court seems to have gone

(*a*) *Pegler v. Hislop*, 1 Exch. 437; S. C. 5 D. & L. 223.

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further, and to have held that it was competent for the defendant to shew that the plaintiff had no cause of action; they say, however, that the defendant must satisfy them clearly and beyond a doubt, of that fact, before they will interfere. But, at any rate, it is clearly competent for the defendant to shew that he had no intention of leaving the country. This the defendant here attempts to do. [His Lordship then proceeded to remark upon the affidavits as to there being no cause of action, and as to the defendant not being about to quit the country, and after stating that the defendant had not convinced him of either fact, discharged the rule with costs.]

Rule discharged (a).

(a) With costs.



November 14

MINET v. ROUND.

[In the Common Pleas.

Coram *Jervis, C. J., Williams, J., and Talfourd, J.*]

Service of a writ of summons abroad is an irregularity only, and not a nullity.

Where, therefore, a defendant resident at Boulogne, was served there with a writ of summons on

BRAMWELL moved for a rule calling on the plaintiff to shew cause why the service of the writ of summons in this action, and all subsequent proceedings, should not be set aside, under the following circumstances.

The defendant was personally served on the 13th of September last with the writ, at Boulogne-sur-Mer, where he had resided for the last ten years. He did not appear to the action; and, upon an affidavit that he had been per-

the 13th of September, an appearance was entered for him on the 24th of October, and the declaration was served by leave of a Judge, by sending it on the 25th through the post;

Held, that an application made on the 14th of November to set aside the writ and other proceedings, was too late; even though the subsequent proceedings were taken under affidavits which suppressed the fact that service had been effected abroad.

sonally served, but without mentioning where the service had been effected, the plaintiff, on the 24th of October, entered an appearance for him. An application was then made to *Talfourd*, J., at Chambers, for leave to serve the defendant with the declaration, by sticking up notice of it in the Master's Office, and sending it to his residence at Boulogne; and his Lordship on the 25th, made an order accordingly. Notice was stuck up, and the declaration was posted on the same day. The affidavit used upon that occasion was made by the person who had made the affidavit of service, and, after stating such service (again suppressing the place), and the entering an appearance for the defendant, it alleged that the deponent had inquired for the defendant at No. 2, St. Alban's Place, Regent's Park, an hotel to which he had been informed that the defendant went when in this country; that he was informed that the defendant was not living there, and that it was not known where he was to be found; that the deponent had made diligent inquiry to find his abode, and had ascertained that he had no residence in England, but had resided, and was still residing, at the Quai des Douanes, at Boulogne-sur-Mer, where the deponent had seen him. The defendant, upon being served with the declaration, communicated with his attorney, who, on the 4th of November, wrote to the plaintiff's attorney, complaining of the irregularity of the whole of the proceedings. He received, on the following day, an answer, stating that the plaintiff had signed judgment.

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Bramwell now contended that the service of the writ, and all subsequent proceedings, ought to be set aside. [*Jervis*, C. J.—Are you not too late?] The delay has arisen from the defendant having, in the first instance, sworn the affidavit in support of the present motion before the English consul at Boulogne, who has no authority to administer an oath; the defendant was therefore obliged to come over to England for the express

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purpose of swearing his affidavit. But this is not a case which comes within the rule that a party must apply to the Court within a reasonable time. [*Williams, J.*—Is not the service of the writ at Boulogne a mere irregularity? Is it not just as if the defendant had been served by mistake in Surrey instead of Middlesex?] The case is altogether different. The service abroad is no service at all: it is a nullity, and not an irregularity. But even if it be an irregularity, the rule that the defendant must move to set it aside within eight days cannot apply to the case of a party abroad, otherwise a defendant in a distant country, can never be safe. [*Jervis, C. J.*—What is a reasonable time must depend upon the circumstances of each particular case. A man may come to London from Boulogne in a shorter time than he can from Newcastle?] Further, the Court will set aside these proceedings, because it appears that a fraud has been committed. The fact that the service of the writ was effected abroad was fraudulently suppressed; otherwise the plaintiff could not have proceeded to judgment.

JERVIS, C. J.—It is difficult to draw the line between a nullity and an irregularity. I have heard of a case in which the defendant had no notice of the proceedings in the action until he was sold up, and that was held a mere irregularity. In this case, the suppression in the affidavit of the fact that the service upon the defendant was effected abroad was, no doubt, very reprehensible; but although the defendant was perhaps justified in treating the service of the summons as an empty threat, I think that when he was served with the declaration, he must have seen that the plaintiff was in earnest, and that the matter was serious; and if he wished to object to the proceedings, he ought to have come sooner.

WILLIAMS, J. (a), and TALFOURD, J., concurred.

Rule refused.

(a) *Maule, J.*, was absent.

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REGINA *v.* The RECORDER OF DERBY.

November 15.

[*Bail Court. Coram Patteson, J.*]

WILLMORE moved for a rule calling upon the Recorder of Derby to shew cause why a writ of mandamus should not issue, commanding him to enter continuances and hear an appeal against an order for the removal of a pauper from the parish of St. Werburg, in the borough of Derby, to the parish of Ibstock, in the county of Lincoln.

It appeared upon the affidavits, that on the appeal being called on for trial, the respondents objected that the statement of the grounds of appeal was not delivered within the time prescribed by the 11 & 12 Vict. c. 31, s. 9, for giving a notice of appeal. The Recorder allowed the objection, and refused to hear the appeal.

The 11 & 12 Vict. c. 31, s. 9, which enacts, "that no appeal shall be allowed against any order of removal, if notice of such appeal be not given as required by law, within the space of," &c., does not require that the statement of the grounds of appeal should be given within the prescribed time.

Willmore. The sessions were wrong in supposing that the 11 & 12 Vict. c. 31, s. 9, affects the giving of the statement of the grounds of appeal. That section merely enacts, "that no appeal shall be allowed against any order of removal if notice of such appeal be not given as required by law, within the space of twenty-one days after the notice of chargeability and statement of the grounds of removal shall have been sent by the overseers," &c. "of the removing parish," &c. The notice and the statement of the grounds of appeal are two different documents; and although the latter may be included in the former, it is not necessary, and, in practice, it is not usual, to include it. The 13 & 14 Car. 2, c. 12, which first gives the power of appeal, makes no provision as to notice of appeal. The statute of 9 Geo. 1, c. 7, s. 8, is the first that does so, and that merely requires a reasonable notice to be given. The 4 & 5 Wm. 4, c. 76,

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s. 79, enacts, that the pauper is not to be removed till after twenty-one days from the notice of chargeability given; and if notice of appeal be given within the twenty-one days, then not till after the final determination of such appeal. Sect. 81, for the first time, mentions the statement of the grounds of appeal. That section enacts, that "in every case where notice of appeal against such order shall be given, the overseers," &c. "of the parish appealing," &c. "shall, with such notice, or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried, send or deliver" "a statement in writing under their hands of the grounds of such appeal," &c. There is nothing, therefore, in any of the statutes upon which to found the objection taken by the sessions.

Boden shewed cause in the first instance. The "notice of such appeal" as is "required by law," mentioned in the 9th section of the 11 & 12 Vict. c. 31, must mean such a notice as entitles the party to have his appeal heard; but he is not entitled to have it heard unless he has given notice of the grounds of his appeal. [*Patteson, J.*—The act does not say, "if notice of such appeal, as is required by law, be not given," but "if notice of such appeal be not given as required by law:" the words "required by law" refer to the mode and time of giving the notice, not to its contents.] The statute under consideration is the first that imposes any limitation as to the mode or time by which the giving of the notice is to be regulated. Unless the construction put upon the section by the sessions be correct, no effect is given to the words "required by law." It is not intended to deny that, according to the case of *Rex v. Justices of Suffolk (a)*, the notice and grounds of appeal may be separate documents, and delivered at different times; although the terms of the 81st section of the 4 & 5 Wm. 4, c. 76,

(a) 4 A. & E. 319; S. C. 5 N. & M. 503.

might admit of a different construction, and the marginal abstract of that section is, "grounds of appeal to be stated in notice." But it is submitted that both must be delivered within the time prescribed by the 11 & 12 Vict. c. 31, s. 9.

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Willmore, in reply, was stopped by the Court.

PATTESON, J.—I feel no doubt whatever upon this point. The words used in the 9th section, and throughout the 11 & 12 Vict. c. 31, as to grounds of appeal, are not "notice" "of grounds of appeal," but "statement" "of grounds of appeal." In construing this statute, we must see how the law stood before. Previous to the late act, the notice, and statement of the grounds, of appeal might be given in separate documents and at separate times. The case of *Reg. v. The Justices of Suffolk* shews not only this, but that the notice of appeal might even be given after the statement of the grounds of appeal.

It is to be observed, that a considerable difference is made by the Legislature between the statement of the grounds of removal and the statement of the grounds of appeal. In the former case, the statute provides (*a*), that the notice of chargeability shall be "accompanied by a statement in writing under the hands of such overseers or such guardians, or any three or more of such guardians, setting forth the grounds of such removal," &c.; but there is nothing in the act requiring that the notice of appeal shall be accompanied by a statement of the grounds of appeal.

It has been argued, that the words "as required by law" extend the meaning of the word "notice" so as to make it comprehend "the statement of grounds of appeal:" but I think I cannot read those words as including a "statement of the grounds of appeal;" as the Legislature itself always uses the latter expression when describing that document, and the "statement" of "the grounds of appeal" has never hitherto

(*a*) 11 & 12 Vict. c. 31, s. 2.

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been considered as part of the "notice of appeal." Besides, the statement of the grounds of appeal must be in writing, under the hands of the overseers, or three or more of the guardians, and there is no provision that requires that the notice of appeal should be so given. The point appears to me to be so clear, that I am at a loss to conceive how a doubt can be raised upon it. The rule must therefore be absolute.

Rule absolute.

November 16.

HARVEY v. HUDSON.

[In the Exchequer of Pleas.

Coram *Pollock, C. B., Parke, B., Alderson, B., and Martin, B.*]

A warrant of the Insolvent Court, dated the 8th of April, 1850, under 1 & 2 Vict. c. 110, ordering that a prisoner "shall be discharged" "forthwith, as to the detainer of" S., and "as to the detainer of" H., "at the period of three calendar months" "from the 7th of January, 1850,"—the date of the vesting order,—

is a sufficient authority to the keeper of the prison for his discharge forthwith; and is an answer to an action for not bringing up the prisoner under a habeas corpus ad satisfaciendum, delivered to the keeper before, but returnable after such discharge, although returnable within three months from the date of the adjudication and warrant.

The keeper in such action may plead not guilty by statute, and give the warrant in evidence under that plea.

Quære, whether an adjudication of the Insolvent Court in the same form is good.

CASE. The declaration, stated that the plaintiff had recovered judgment in this Court, against William Port Hallows in an action of debt; that he, at the time of the judgment, was in the Queen's Prison in execution at the suit of W. G. Smith, and that the plaintiff sued out a writ of habeas corpus ad satisfaciendum, directed to the defendant as keeper of the Queen's Prison, directing him to have the body of the said W. P. H., before the Barons of the Exchequer, on the 15th of April, 1850; that the writ was delivered to the defendant on the 28th of March, 1850, whilst W. P. H. was in his custody, but that the defendant, instead of obeying it, falsely alleged that W. P. H. was entitled to be at large, by virtue of a warrant of the

Court of Insolvent Debtors, dated the 8th of April, and permitted W. P. H. to be at large, and returned to the writ of habeas corpus, that W. P. H. had been discharged out of his custody by such warrant on the 9th of April.

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Plea: not guilty by statute. Upon the trial before *Martin*, B., at Guildhall, on the 11th of November, in the present term, the defendant tendered in evidence a warrant of the Insolvent Court, dated the 8th of April, 1850, and also the adjudication upon which it was founded.

The adjudication, which was of the same date, after stating the examination and the prisoner's swearing to its truth and executing a warrant of attorney, continued as follows. "It is adjudged and ordered that the said prisoner shall be discharged from custody, and entitled to the benefit of the said act forthwith, as to the several debts and sums of money due or claimed to be due on the 7th of January, 1850, being the time of making the order vesting the estate and effects of the said prisoner, pursuant to the statute in that behalf, from the said prisoner to the several persons named in the schedule, as creditors or claiming to be creditors for the same respectively, or for which such persons gave credit to the said prisoner, before the said time of making such vesting order, and which were not then payable, and as to the claims of all other persons not now known to the said prisoner, who may be indorsees or holders of any negotiable security set forth in the said schedule so sworn to as aforesaid. Excepting as to a certain debt due from the said prisoner to J. Harvey." "And forasmuch as it appears to the said commissioner, that the said prisoner hath put the said J. Harvey to unnecessary expense by a vexatious and frivolous defence to a suit for the recovery of his debt, it is adjudged and ordered that the said prisoner shall be discharged from custody, and entitled to the benefit of the said act as to the said J. Harvey, so soon as the said prisoner shall have been in custody, at the suit of the said J. Harvey, for the same debt for the period of three calendar months to be computed from the said time of making such vesting order as aforesaid," &c.

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The warrant, which was directed to the defendant, was as follows:—

“Gaoler’s warrant,
forthwith and at } “Upon adjudication duly made here-
future period.” } in, it is ordered that the said prisoner
shall be discharged from your custody forthwith, as to the
detainer of W. G. Smith, and that the said prisoner shall be
discharged from your custody as to the detainer of J. Harvey,
at the period of three calendar months, to be computed from
the seventh day of January, 1850, being the time of making
the order vesting the estate and effects of the said prisoner,
pursuant to the statute in that behalf, and for so dis-
charging the said prisoner from custody, as to the said
several detainers respectively, this shall be your sufficient
warrant.”

It was objected, on the part of the plaintiff, that this evidence was not admissible on the plea of not guilty; but the learned Judge overruled the objection. It was also objected that both the adjudication and warrant were bad, and therefore afforded no justification to the defendant, but the learned Judge stated that in his opinion, the warrant was a sufficient authority to the defendant and directed a verdict for the defendant, reserving leave to the plaintiff to move upon both points to enter a verdict for him.

Badeley now moved accordingly. First, the adjudication and warrant do not justify the defendant. The adjudication is void for two reasons. It is insensible, as it directs that the insolvent shall be discharged, so soon as he has been in custody at the suit of the plaintiff for three months, from the date of the vesting order. That period had then elapsed, and it therefore orders a future imprisonment during a past time. The 1 & 2 Vict. c. 110, s. 85, gives a power to a creditor who has not already obtained a detainer against the insolvent, to arrest him at any time after the adjudication,

and before the period of his sentence has elapsed, clearly shewing that the act contemplated an imprisonment for a future period.

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It is also bad for directing that the insolvent shall be discharged forthwith, and also at a future period. By sect. 76, the Insolvent Court may discharge a prisoner "forthwith, or so soon as" he has been in custody, at the suit of a creditor, for any period not exceeding six months, and by sections, 77 and 78, if he has committed certain offences, he may, according to their nature, be imprisoned for three or two years. These powers are given in the alternative, and throw upon the Court the duty of deciding under which section it will act, but it cannot in one order include a discharge forthwith, and at a future period. [*Parke, B.*—How does the adjudication affect the defendant? he has only to obey the warrant: that was decided in *Thomas v. Hudson (a)*.] The same objections apply to the warrant. Looking at its date it is insensible; and, as appears in the margin, it includes a discharge forthwith, and at a future period. If the irregularity of the warrant appears upon the face of it, the gaoler is not protected; *Watson v. Bodell (b)*. [*Alderson, B.*—The gaoler is not to criticise the language of the warrant. When the whole is read together, though the expressions are awkward, it is the same as a discharge forthwith.] Secondly, this evidence ought not to have been received under the plea of the general issue. By sect. 110, if any action is brought against the gaoler for an escape, or for performing the duty of his office in pursuance of that act, he may plead the general issue, and give the special matter in evidence; but this action does not come within that provision; for it is brought for disobeying the writ of a superior Court.

Lastly, even if the Court should hold the warrant sufficient, and that it can be given in evidence under the

(a) 2 D. & L. 873; S. C. 14 M. & W. 353, affirmed cam. scacc. 16 M. & W. 885. See also *Norton v. Walker*, 3 Exch. 480. S. C. 6 D. & L. 204.
(b) 14 M. & W. 57.

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general issue, it is no answer to the writ of habeas corpus, which the defendant should have obeyed as the writ of a superior Court. It is an unconditional direction to the defendant to have the body of W. P. Hallows before this Court, and could not be affected by a warrant of the Insolvent Court. [*Martin*, B.—The writ only directs the defendant to bring up Hallows, who is “detained under your custody.” *Pollock*, C. B.—If your argument be correct, the gaoler would be equally bound to bring up a man who, while he is in custody, becomes a peer or a member of Parliament, or, if the prisoner died, his body.]

POLLOCK, C. B.—The Court entertaining no doubt as to the questions raised, the rule must be refused. We have to decide two questions; first, whether the warrant of the Insolvent Debtors’ Court is an answer to the plaintiff’s action; and, secondly, whether it can be given in evidence under the general issue. As to the latter point, I think that, even without the protection of the statute, the evidence should have been received, since, if the defendant acted rightly in obeying the warrant of the Insolvent Court, he was not guilty of disobedience to the writ of habeas corpus with which the declaration charges him. It is, however, unnecessary to decide this, as the case is clearly within the protection of the 1 & 2 Vict. c. 110, s. 110, as an act done in obedience to that statute. On the other point, Mr. *Badeley* calls our attention to the distinction between forthwith, and for a future period; but there is, in truth, no such distinction made by sections 76, 77, and 78. It is true, that in the margin of the warrant the words “forthwith and at future period” are written; but that does not form part of the warrant. “Future” refers not to the time of the adjudication, but to the date of the vesting order, from which the imprisonment by sections 76, 77, and 78 is to date. We need not, however, speculate on whether the commissioner has adopted the proper form of adjudication; as the defendant is protected by the warrant, which is sufficiently clear

for him to act on. Had he acted differently, he would have been liable to an action. The warrant of discharge prevents his obeying the writ of habeas corpus, just as if his prisoner had become a peer, or member of Parliament.

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PARKE, B.—I think the matter is quite clear. Mr. *Badeley* raised three questions. First, did the defendant act rightly? secondly, may he give the special matter in evidence under the general issue? and, lastly, whether, notwithstanding the warrant of the Insolvent Court, he ought not to have brought up the body of Hallows before us? I think the first question is answered by the case of *Thomas v. Hudson*(a). As to the warrant, though the intention of it is somewhat awkwardly expressed, I think it means that the prisoner is to be discharged immediately. A doubt occurred to my mind in the course of the argument, whether there was not an error on the face of the warrant, because, under sect. 76, the Insolvent Court may discharge a prisoner “forthwith,” or “so soon as such prisoner shall have been in custody” for a period not exceeding six months; but looking at the intention of the Legislature, it clearly means that the prisoner may be discharged at a future period, though he has never been in custody at all. The warrant by itself is therefore, I think, sufficient. On the second point, I think the case comes within sect. 110. As to the last, Mr. *Badeley*’s argument proceeds on a mistake as to the effect of the writ of habeas corpus; when once a prisoner has been discharged, the gaoler has no power to retake him under that writ.

ALDERSON, B.—I am of the same opinion. If called upon to decide whether the adjudication is good, I should incline to say no; as I construe “future,” in the act, to mean at some time when, if the insolvent is out of custody, the creditor may arrest him and detain him till the expiration

(a) 2 D. & L. 873; S. C. 14 M. & W. 353; affirmed cam. scacc. 16 M. & W. 885. See also *Norton v. Walker*, 3 Exch. 480; S. C. 6 D. & L. 204.

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of the time named; but as to the warrant, there is nothing to shew that it is for a future period. The marginal note forms no part of it, and the language used in the body of the instrument itself is only an awkward and periphrastic mode of expressing forthwith. That being so, it is conceded, that had the warrant been for a discharge forthwith only, the defendant would have been justified. With regard to the question of the general issue, I think, even without the statute, that plea would have sufficed, as, that being the effect of the warrant, there would have been no wrongful act; but sect. 110 places the matter beyond question.

MARTIN, B., concurred.

Rule refused.

November 19.

Ex parte DEARDEN.

[In the Exchequer of Pleas.

Coram Pollock, C. B., Parke, B., Alderson, B., and
Platt, B.]

Upon an attorney's changing his name, the Court of Exchequer refused to direct the Master to alter the name on the roll of the Court; but directed him to make a memorandum in the margin of the roll opposite to the applicant's name, stating that he is now known by the name of —, and that the same has been done by rule of Court (a)

*A*THERTON moved that the Master be directed to alter the name of Josiah Dearden on the roll of attorneys of this Court, by inserting "Heaton" after "Josiah," and that the name of "Josiah Heaton Dearden" stand on the roll instead of "Josiah Dearden," and that the Master be at liberty to make an indorsement of such alteration on the admission of the said J. D. (a). The motion is made in consequence of Mr. Dearden having adopted the name of

(a) This was the same form of similar application by Mr. Dearden on the 2nd of November.
rule as had been made by the
Court of Queen's Bench upon a

(a) See *Ex parte William Daggett*, ante, p. 1, and *Ex parte Thomas James*, ante, p. 4.

Heaton, being that of a relation by whom property has been left to him. The Courts of Queen's Bench and Common Pleas have granted similar rules (*a*); but the Master in this Court has objected to the form of the rule. [*Alderson*, B.—How can the Master sign the attorney's name? *Parke*, B.—Should not the Master insert in the margin that his name is changed, and that he is now named Josiah Heaton Dearden?]

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POLLOCK, C. B.—The Master should not alter the name, but make a memorandum in the margin of the roll opposite to his name, stating, that he is now known by the name of Josiah Heaton Dearden, and that the memorandum has been made by rule of Court.

[PER CURIAM.

Rule accordingly (*b*).

(*a*) The rule in the Common Pleas was as follows: "It is ordered that the Masters be at liberty to amend the roll of attorneys of this Court by altering the name of Josiah Dearden to Josiah Heaton Dearden, and that the Master be at liberty to make an indorsement on his admission in this Court accordingly."

(*b*) The reporters are indebted to Mr. Tootell, of the Common Pleas Rule Office, for the following information:—Prior to the 6 & 7 Vict. c. 73, the roll of attorneys in the Court of Common Pleas was a book in which the names, &c. of those who were admitted attorneys of the Court, were entered by the clerk of the warrants, with whom all admissions were required to be left for enrolment. Since the passing of the 6 & 7 Vict. c. 73,

another roll, consisting of a long slip of parchment, is kept, in compliance with the provisions of the 27th section of that act, and is signed by all persons who are admitted attorneys of the Court. But the book, which before the recent act was known as the roll, is still kept by a clerk in the Master's Office, who enters in it the names, &c. of all persons admitted. Where, therefore, as in the case in the text, the attorney was admitted before the passing of the 6 & 7 Vict. c. 73, the rule should be in the form given in the last note. But where the attorney was admitted subsequently to that act, the form used has been "that the Master be at liberty to permit J. A. R. to amend the roll of attorneys of this Court, by altering the name 'J. R.' thereon to 'J. A. R.'"

November 19.

BERTON v. LAWRENCE and Others.

[In the Exchequer of Pleas.

Coram *Parke, B.(a), Alderson, B., and Platt, B.*]

Semble, that in debt against the sheriff under 29 Eliz. c. 4, to recover treble damages for taking greater fees than are allowed by that act, on several different writs of *fi. fa.*, it is not sufficient to allege generally that the defendant took —*l.*, being a larger sum, &c. : but the declaration should state what he ought to have taken, and what was the excess, on each writ.

DEBT for 15*l.* 6*s.* 6*d.* The declaration stated, that heretofore, to wit, &c., a writ of *fi. fa.* was issued out of the Court of Exchequer, by and at the suit of H. H. and H. R., against the plaintiff, directed to the sheriff of Middlesex, and commanding him to levy on the plaintiff's goods 26*l.* 12*s.* debt, and 40*l.* 1*s.* costs, with interest at 4*l.* per cent. per annum from the day on which the judgment was entered up; that the writ was indorsed with a direction to the said sheriff to levy those sums, "and 1*l.* for the said writ, besides sheriff's poundage." The declaration then—after alleging that four other writs of *fi. fa.* were sued out against the plaintiff by different persons to levy different sums respectively, and were indorsed accordingly—stated, that the said several writs so indorsed were afterwards, to wit, &c., delivered to the defendants, William Lawrence and Donald Nicoll, who then and from thenceforth, until, &c., were sheriff of the county of Middlesex, to be executed; that the defendants, W. L. and D. N., so being and as such sheriff, by the defendant, W. D., then being their bailiff, in that behalf afterwards, to wit, on, &c., seized and took in execution, under the said several writs respectively, divers goods and chattels of the plaintiff, of great value, to wit, of the value of the moneys indorsed on the said several writs, and thereby directed to be levied. Nevertheless, the defendants, W. L., and D. N., so being and as such sheriff, and the defendant, W. D., so being and as such

(a) *Pollock, C. B.*, was presiding in the Court of Criminal Appeal.

bailiff, not regarding their duty in that behalf, nor the form of the statute in such case made and provided, but contriving, &c., afterwards, to wit, on, &c., by reason and colour of their several offices, as such sheriff and as such bailiff, wrongfully, illegally, and oppressively took, had, and received of the plaintiff, for the serving and executing of the said several executions a large sum of money, to wit, 52*l.* 12*s.* 3*d.*, the same sum being a larger, greater, more, and other consideration and recompence than by the statute in that behalf is limited, that is to say, 35*l.* 18*s.* 6*d.* more and other consideration and recompence than in and by the said act is limited and appointed, contrary to the form of the statute, &c.; by means whereof the plaintiff was and is damaged and aggrieved to the amount of the said sum of 35*l.* 18*s.* 6*d.*, contrary to the form of the statute, &c.; and thereby and by force of the said statute an action hath accrued to the plaintiff, to demand and have of and from the defendants the sum of 107*l.* 15*s.* 6*d.*, being treble the amount of the said damages, and parcel of the sum above demanded.

Special demurrer and joinder.

Bramwell (*Burchell* with him). The extortions complained of should have been set out with greater certainty and particularity. The proper form was, to aver what sums the sheriff was entitled to receive, how they were fixed, and how much was extorted under each writ. Here the sums extorted are stated to be one aggregate sum; and if issue were joined, the question both of law and fact would be left to the jury. [*Alderson*, B.—The extortion might have been all under one writ. *Platt*, B.—Was not this form held good in *Woodgate v. Knatchbull* (a)?] There was no demurrer in that case. The action is not common, as parties who are injured have a more speedy remedy by applying to the Court (b). A plaintiff is bound

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(a) 2 T. R. 148.

(b) See 7 Wm. 4 & 1 Vict. c. 55, ss. 3, 4.

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so to declare that the defendant may be able to answer the charge without violation of any of the rules of pleading. How could the defendants do so here? Is the sheriff to say, as to one writ I acted thus, and as to another, thus? The present declaration is in the nature of five different actions, and the defendants would be obliged to go to trial prepared to meet questions which might arise as to any of the writs, when the only question really in dispute might be as to one. [*Parke, B.*—Would this declaration be supported if the plaintiff proved five different writs, five levies, and five extortions?] It is submitted it would. The plaintiff might prove three different states of facts; a gross levy and a gross charge, five separate levies and five charges, or a levy and charge in one or more of the cases. [*Alderson, B.*—What evil do you sustain by want of particularity?] Some of the charges might be justifiable, and on those the defendants would join issue; others might not be so, in which case they would pay money into Court as to them. In *Pilkington v. Cooke* (a), the same objection was raised, but the Court gave no judgment on it. [*Parke, B.*—In *Ashby v. Harris* (b), the point was taken, but the plaintiff elected to amend.] In *Usher v. Walters* (c), the declaration was held bad on demurrer, for not shewing what excess was taken on each fee. That case was cited in *Pilkington v. Cooke*, but not on this point. In *Wrightup v. Greenacre* (d), there was an averment of how much the sheriff was entitled to take, and how much he did take. Here, the whole question is left to the jury, not only whether the sum was taken, but also whether it was a proper sum.

Pigott, contra. The declaration is good, and follows the established form. In all issues there must be some mixed question of law and fact. In *Ashby v. Harris*, there was

(a) 16 M. & W. 615; S. C. 4 D. & L. 347.

(c) 4 Q. B. 553; S. C. 3 G. & D. 594.

(b) 2 M. & W. 673; S. C. 5 Dowl. 742.

(d) 10 Q. B. 1.

no allegation of what the sheriff took, but only that he took so much more than he was entitled to. *Usher v. Walters* has no application, for the declaration did not state what the defendant ought to have taken; and the judgment of the Court proceeded on that ground. [*Alderson, B.*—How do you aver that here?] The declaration states that the defendant took 52*l.* 12*s.* 3*d.*, and that he took 35*l.* 18*s.* 6*d.* too much; so that the amount which he ought to have taken is arrived at by a simple calculation, and need not be more particularly averred. [*Parke, B.*—Suppose the case put by Mr. *Peacock* in *Ashby v. Harris* (a), viz., a plea of the Statute of Limitations, stating that the action did not accrue within the time limited by law; surely such a plea would be bad. But even were you to succeed on that point, I do not see how you can answer the objection, that the present form of declaration does not tie the plaintiff down to prove that it was one act and receipt on the part of the sheriff. It does not say that he took the amount at one time, nor does it shew that there was a joint extortion under all the writs, or a separate extortion under each.] When five writs are delivered to the sheriff at one time, the debtor cannot know under which the extortion is made. At all events, the objection suggested is not sustainable, as it is not raised by the demurrer.

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[The Court here intimated that as the point was not raised in the grounds of demurrer, the defendants might take time to consider whether they would amend; and they subsequently elected to do so.]

(a) 2 M. & W. 673, 675.

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CUBITT and Another v. THOMPSON and Others.

[In the Exchequer of Pleas.

Coram *Parke, B., Alderson, B., and Platt, B.*]

By a deed executed by defendants, W. T., a bailiff, and two sureties, to plaintiff, the sheriff, the defendants covenanted to save harmless the plaintiff from any action brought against him "touching or concerning any matter wherein the said bailiff shall act or assume to act as bailiff," or "for or by reason of any extortion or escape happening by the act or default of the said bailiff." The plaintiff, in declaring on this deed, after stating an escape, alleged that it happened "by the default of the defendant W. T., and not otherwise, he the defendant

W. T. then being bailiff of the said plaintiff as such sheriff." The defendants, after craving over of the deed, pleaded that the default "was not a default of him the said W. T., as such bailiff of the plaintiff.

Held, first, that the plea was bad, on special demurrer, for ambiguity.

And, secondly, that although the declaration was, *semble*, bad, on special demurrer, for not shewing that the default was a default of W. T. as bailiff, it was sufficient, after pleading over.

COVENANT. The declaration stated, that by an indenture made between the plaintiffs, sheriff of Middlesex, of the one part, and the defendants of the other, (profert), after reciting that the plaintiffs, at the request of the defendant W. Thompson, had nominated and appointed him bailiff of the plaintiffs, the defendants covenanted with the plaintiffs, "that W. Thompson should not suffer any escape, nor permit any prisoner in his custody, as bailiff aforesaid, to go at large without the consent or order in writing of the said sheriff, or other lawful authority;" and that if any action or suit was commenced against the plaintiffs, their undersheriffs or deputies, in consequence of any acts of the defendant W. Thompson, the defendants would reimburse them. The declaration then stated, that whilst the defendant W. T. was their bailiff, one M. Morgan sued out a writ of ca. sa. directed to the sheriff of Middlesex, to take the body of one W. Hanson, and that the plaintiffs, as sheriff, took the said W. H.; and alleged several breaches, the last of which was as follows: "that after the said W. H. had so been arrested as aforesaid, and whilst he was in the custody of the plaintiffs, as such sheriff as aforesaid, under and by virtue of the said writ and indorsement thereon as aforesaid, and in pursuance of the said arrest, and whilst the said defendant W. T. was

such bailiff of the plaintiffs as such sheriff as aforesaid, under and in pursuance of the nomination aforesaid," to wit, &c., "the said W. H., without the permission and against the will of the plaintiffs and of the said M. M., escaped out of the said custody of the plaintiffs as such sheriff; and that such escape then happened by the default of the said defendant W. T., and not otherwise, *he the said defendant W. T., then being bailiff of the said plaintiffs as such sheriff as aforesaid, under and in pursuance of the nomination aforesaid.*" Averment that in consequence of such escape, M. M. commenced an action against the plaintiffs, and recovered judgment of 66*l.* 12*s.* 8*d.*, together with costs.

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The defendants craved oyer of the indenture, and set it out. It contained the following, among other covenants by the defendants, for the due performance by the defendant, Thompson, of various duties as bailiff: "That if any action or suit be commenced or prosecuted against the said sheriff, or under-sheriff, or deputies, or any of them, touching or concerning any matter wherein the said bailiff shall act or assume to act as bailiff aforesaid, the said bailiff shall well and truly pay to the said sheriff, undersheriff, or deputies, or one of them, all costs, charges, damages, and losses by them or any of them incurred, paid, or sustained, in or about the defence, or in consequence of such action or suit." Also "that the defendants, their heirs," &c., "will save harmless the plaintiff," &c., "against all actions, suits," &c., "for or by reason of any extortion or escape happening by the act or default of the said bailiff, or for or by reason of the executing, non-executing, returning, not returning, or mis-returning any writ, process," &c.

Eighth plea to the last breach, that the said default of the said W. T., in that breach mentioned, by which the said W. H. so escaped as in that breach mentioned, was not a default of him, the said W. T., as such bailiff of the plaintiffs as in the declaration mentioned, modo et formâ, concluding to the country.

Special demurrer and joinder.

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Bramwell (*Burchell* with him). The plea is no answer to the breach to which it is pleaded, inasmuch as it admits the escape, and that Thompson was the plaintiffs' bailiff, and that the escape happened by his default. Whether or not it was by his default "as bailiff" is immaterial. The bond declared on provides against three classes of default. First, defaults by Thompson, while acting as bailiff; secondly, defaults by him while assuming to act in that character; and thirdly, defaults by him generally, while bailiff, but without any reference whatever to that character. Of the last class of defaults would be the case of his setting at liberty, without first searching the detainer book, a man whom he had arrested. Such a neglect would hardly be a default in the character of bailiff; for his duty as bailiff is confined to the execution of the writ entrusted to him, and does not extend to searching whether the sheriff had a writ at the suit of another person. It is therefore unnecessary, in declaring on this deed, to shew that the default was committed by the defendant, Thompson, as bailiff.

Crompton, contra. Either the plea is good, or the declaration bad. The declaration does not state whether the defendant, Thompson, is charged with default as bailiff or not. If he is charged in that character, the plea is sufficient, for it is a traverse of a material averment, which, if not expressly alleged, is necessarily implied. If the default charged is general, the declaration is insufficient, as it does not shew an act done by the defendant Thompson quâ bailiff, but by him quâ William Thompson.

Bramwell, in reply, was stopped by the Court.

PARKE, B.—The traverse in the plea is bad, since it may mean several things. The only question is, whether the declaration is sufficient. I think it would have been bad on special demurrer; but the defendants having pleaded over, it is cured. The breach is founded on the covenant,

which provides against the "default of the said bailiff" generally, but it does not aver whether it was a default "as bailiff," or whilst assuming to act as bailiff. The defendants, however, having taken issue on it, I think it is sufficient on general demurrer. The traverse in the plea is clearly bad, as the Court cannot say what it means.

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ALDERSON, B., and PLATT, B., concurred.

Judgment for the Plaintiffs.

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November 16.

[In the Common Pleas.

Coram *Jervis, C. J., Maule, J., Williams, J., and Talfourd, J.*]

TRESPASS for breaking and entering the house of the plaintiff, and taking his goods.

Plea. Not guilty by statute.

Upon the trial before *Wilde, C. J.*, at the sittings in Middlesex after Trinity Term last, it appeared that the house in which the alleged trespass was committed, was the dwelling-house and place of business of one Bartlett, a bankrupt; and that the defendant, who was the messenger of the Court of Bankruptcy, on the 27th of November, 1849, entered into his house, under a warrant of that Court in the ordinary form, ordering him to enter the house of the bankrupt or any other house where his property might be, or be suspected to be, and to seize his property. The plaintiff claimed the stock and effects upon the premises under a bill of sale; but the defendant refused to give them up to him

A messenger of the Court of Bankruptcy, who acting under a warrant to take the goods of A. takes the goods of B., is not protected by the 107th section of the Bankrupt Law Consolidation Act, although he acted *bonâ fide* and in the reasonable belief that he was acting in obedience to his warrant.

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without the sanction of the official assignee, and kept them until the 7th of December, when the official assignee ordered them to be sold. The plaintiff did not ask for a copy of, or for leave to peruse, the warrant. It was admitted that the defendant had acted with bona fides, and in the reasonable belief that the goods were Bartlett's. Under these circumstances it was contended on behalf of the defendant, that he was protected by the 107th section of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), and that the plaintiff ought to be nonsuited. A verdict was, however, taken for the plaintiff for the amount which the goods fetched at the sale, leave being reserved to the defendant to move to set the verdict aside and enter a nonsuit (*a*).

E. James having, in this Term, obtained a rule accordingly,

Byles and *Miller*, Serjts., shewed cause. The question is whether, when a messenger of the Court of Bankruptcy seizes, under a warrant to take the goods of a bankrupt, the property, not of the bankrupt, but of a third person, it is

(*a*) It was contended at the trial that the gist of the action was the trespass upon the house, and that the taking of the goods was only matter of aggravation; consequently, that as the house was shewn not to be the plaintiff's, he ought to be nonsuited. The learned Judge, however, held that the trespasses were severable, and that the jury might find for the plaintiff in respect of the trespass upon the goods only.

It was further urged that as the defendant had been no party to the sale, and had done nothing more than refuse to allow the goods to be removed without the leave of the official assignee, he was not liable in trespass, and

Hartley v. Moxham, 3 Q. B. 701; S. C. 3 G. & D. 1, was relied upon.

Leave was reserved to move upon these points as well as upon that reported in the text; but the Court refused a rule upon them; observing, as to the last point, that the defendant's entry upon the premises and refusal to give the plaintiff the goods, was taking possession of them; and that the present case differed from the one cited, in this respect, that there the only trespass relied upon was the refusal by a landlord to allow his lodger access to the rooms in which the goods of the latter were, which here there was an actual detention of the goods.

necessary, in order to maintain an action, that that person should ask for a copy, and the perusal of the warrant. The proposition of the defendant is based upon the fallacy of overlooking the distinction between cases where a defence is given to a person acting in obedience to a warrant, and those in which a party, although liable to be sued, is entitled to notice of action. In the latter class of cases, a defendant is entitled to notice, if he acted under the belief that he was acting in the execution of his office ; but where a person acts under a warrant, if he relies upon it as a defence, he must shew that he acted in obedience to it. The 107th section of the Bankrupt Law Consolidation Act provides, "that no action shall be brought against any messenger" "for anything done in obedience to the warrant of the Court, unless demand of the perusal and copy of such warrant hath been made or left at the usual place of abode of such messenger," "by the party intending to bring such action." The 24 Geo. 2, c. 44, which is in *pari materiâ* with the section now in question, was passed, as its title states, among other things, "for indemnifying constables and others acting in obedience to their warrants," and sect. 6 enacts, that no action shall be brought against any constable, &c., "for anything done in obedience to any warrant, under the hand and seal of any justice of the peace, until demand hath been made or left at the usual place of his abode by the party or parties intending to bring such action, or by his, her, or their attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after such demand." As long, therefore, as a constable acts within the terms of his warrant he is protected ; but the moment he does something which it does not require him to do, the act ceases to apply. Thus, in *Money v. Leach* (a), which is the leading case upon this subject, the king's

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messengers who, under a warrant to apprehend the authors, printers, and publishers of No. 45 of the *North Briton*, had apprehended persons not falling under any of those descriptions, were held not to be protected by the act. So in *Prestidge v. Woodman* (a), it was laid down that “a constable is not protected, unless he acts in obedience to a warrant; but a magistrate is protected in all cases where he acts in execution of his office. The distinction between the magistrate and the officer, in this respect, is settled in the case of *Money v. Leach*” (b). [*Jervis, C. J.*—The object of the act is to make the party aggrieved sue the person who issued the warrant, and not the constable who executes it.] Where the justice cannot be liable, the officer is not within the protection of the statute; as was said by *Dampier, J.*, in *Bell v. Oakley* (c). The distinction between the cases falling within the 6th section of the 24 Geo. 2, c. 44, and those within the 8th, which limits to six months the time for bringing an action against a justice or constable “for any thing done in the execution of his office,” is pointed out in *Smith v. Wiltshire* (d). The 107th section of the Bankrupt Law Consolidation Act must be construed in the same manner as the 24 Geo. 2, s. 6; for its object and language are substantially the same.

E. James, in support of the rule. The messenger is protected by the 107th section, if he acted bonâ fide and in the reasonable belief that he was acting in obedience to his warrant; and it is admitted that he so acted. The 41st section of the 7 & 8 Geo. 4, c. 30, provides, that “for the protection of persons acting in execution” of that act, all actions brought against persons “for any thing done in pursuance” of it shall be brought within a limited time, and notice of action shall be given: and it has been held, that a defendant is entitled to the protection of that section,

(a) 1 B. & C. 12, 13.

(c) 2 M. & S. 259, 261.

(b) 3 Burr. 1742; S. C. 1 W. Bl. 555.

(d) 5 Moore, 322; S. C. 2 B. & B. 619.

if he acts bonâ fide and under a reasonable belief that he was acting in pursuance of the act; *Kine v. Evershed* (a). [Williams, J.—The protection there given is very different from that which this section gives. There the party is not protected from being sued, but is only entitled to notice of action, in order that he may have an opportunity of making amends.] If the section in question does not apply to a case like the present, it is difficult to conceive a case where its protection would be needed. [Maule, J.—It would be needed if the messenger had acted in obedience to the warrant, but the commissioner had had no jurisdiction to issue it. Talfourd, J.—Who is liable in this case if the defendant be not?] The petitioning creditor; for the same section provides, that he shall be made a co-defendant to the action, and that, upon proof of the warrant, the jury shall find a verdict for the messenger. [Maule, J.—Then, if the section applies to this case, the man who made the mistake is protected; but he who made no mistake is made responsible.] Whether the petitioning creditor be liable or not, it is submitted that the messenger is protected when he acts in the reasonable and bonâ fide belief that he is obeying his warrant. [He referred, also to *Panton v. Williams* (b).]

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JERVIS, C. J.—I am of opinion that this rule must be discharged. If the question had arisen upon the 159th section of the act, which provides, that actions brought “for anything done in pursuance” of the act shall be commenced within three months, the authorities referred to by Mr. James might have applied; for it is quite plain that the defendant acted in pursuance of the act. But it is said, that as he purported to act in obedience to the warrant, he is protected by the 107th section. Now, the meaning of that section is sufficiently explained by the mere reading of its terms. [His Lordship read the section, and then pro-

(a) 10 Q. B. 143.

(b) 2 Q. B. 169.

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ceeded]: It would, therefore, seem perfectly plain, that that section can only apply to cases in which the petitioning creditor would be liable for the act of the messenger. It is manifest, that if the messenger, professing to act under his warrant, had arrested a wrong person, the petitioning creditor would not have been responsible for that wrongful act. Under the 24 Geo. 2, c. 44, which contains a similar provision for the protection of constables, the whole current of authorities shews that a constable is not protected, except where he has acted strictly in obedience to his warrant; and it would be contrary to those authorities, as well as to the plain meaning of the language of this act, if the messenger were in this case held to be protected.

MAULE, J.—I quite agree. The words of the section are very plain, and, understood in the grammatical sense and literal construction which belong to them, shew that this is not a case in which the section applies. If we were to hold it applicable here, it would follow, that a protection and bar would be extended, and a good defence given, in cases in which no analogous statute has given a defence. On the other hand, the section, in its literal sense, is consistent with all the authorities on the subject, and is accordant with the natural meaning of the words and the probable intent of the Legislature. It was evidently intended, that where a person complied strictly with his warrant, and did no more than it ordered him, he should not be responsible for the want of jurisdiction in the authority which issued the warrant; but that responsibility was cast upon the petitioning creditor, who sued out the warrant and gave it to the messenger, and who, therefore, must be taken to have intended that the warrant should be executed, whether there was jurisdiction or not. It is reasonable, therefore, and fair, that he should be the party responsible, and not the less literate and more ministerial person who has acted in obedience to the warrant. Construing, therefore, this section of the act, as all acts and instruments

ought to be construed, except where great and manifest inconvenience must follow,—and there is no such inconvenience here, but, on the contrary, the construction contended for by the defendant would be very inconvenient and inconsistent with authority,—I think that it does not apply to the present case, and, therefore, that this rule must be discharged.

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WILLIAMS, J.—I am of the same opinion. Mr. *James* has not attempted to point out any material distinction between this statute and the 24 Geo. 2; and I cannot find any material distinction in the language, or in the occasion upon which it is used, to indicate any difference in the intention of the Legislature. It is, therefore, sufficient, to say that the question now raised has been settled long ago by numerous authorities.

TALFOURD, J.—I am of the same opinion. The case of *Parton v. Williams* (a), which was decided on the 24 Geo. 2, c. 44, presents the precise distinction between the two sections adverted to by my Lord; for it discriminates between the protection given to a constable acting in obedience to his warrant, and the minor protection afforded him when he acts, not in obedience, but in pursuance of it, and bonâ fide. In that case the warrant was to take the goods of A., and the constable seized the goods of B. The Court would not even grant a rule nisi upon the question whether the constable was protected by the 6th section of 24 Geo. 2, c. 44, which is similar to the 107th section of this act; but they held also, that he was entitled to notice of action under the 8th section. That case, I apprehend, shews the distinction between the two kinds of protection, and disposes of this case.

Rule discharged.

(a) 3 B. & A. 330.

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November 11,
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REGINA v. The RECORDER OF LIVERPOOL.

[*Bail Court. Coram Patteson, J.*]

The 156th section of a local sanitary act (9 & 10 Vict. c. cxxvii.) enacts, that "the net annual value" of property to be rated under the act shall be "ascertained according to the meaning of the words 'net annual value' in the 6 & 7 Wm. 4, c. 96, and shall be "estimated according to such value as the same is" "rated" "in the rate" "for the relief of the poor in the year preceding." *Held*, that the poor rate of the preceding year was conclusive evidence of the net annual value, notwithstanding that sect. 158 directs, that where property is omitted in the poor rate, or has increased in value since the poor rate, a new valuation is to be made; and sects. 170 and 171, which give the appeal, invest the sessions with the same powers as to amending or quashing rates as are by law vested in sessions as to poor rates.

A RULE had been obtained in last Hilary Term, calling on the Recorder of Liverpool to shew cause why a writ of mandamus should not issue commanding him to enter continuances and hear an appeal, in which the London and North Western Railway Company were appellants, and the borough of Liverpool were respondents, against a rate made on the 16th of May, 1849, under the Liverpool Sanatory Act (9 & 10 Vict. c. cxxvii.)

The following facts appeared upon the affidavits. On the 16th of May, 1849, the town council of Liverpool, under a local sanitary act (9 & 10 Vict. c. cxxvii.), made and published a paving rate, by which the property of the London and North Western Railway Company was rated at the same amount as it was rated at under the 6 & 7 Wm. 4, c. 96, for the relief of the poor, on the 29th of July in the preceding year. The company had paid that poor rate without appeal, but had appealed against a subsequent rate made the 5th of May, 1849, by which the company were rated at the same amount; and that appeal was still pending. Before the hearing of the present appeal, a correspondence took place between the attorneys of both parties, which resulted in an arrangement that the only question to be discussed at the hearing should be, whether the Court was bound by the terms of the 156th section of the act to take the last poor rate assessment as conclusive evidence of the net annual value of the com-

The sessions having so decided, and refused to hear any further evidence: *Held*, on application to this Court for a mandamus, that the dismissal of the appeal was not a declining of jurisdiction but a decision upon the hearing of the appeal; and, therefore, that this Court would not issue a mandamus even if the construction put upon the act were wrong.

pany's rateable property, or whether other evidence of its value was admissible. When the appeal came on to be heard at the December Sessions, 1849, the Recorder decided that he was bound by the poor rate assessment, and, therefore, that he could not inquire further into the net annual value of the premises at the time of the rate made. The appeal was dismissed without costs, and the Court refused to grant a case.

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Crompton and Paget shewed cause. First, the Recorder having heard the appeal and decided it, this Court will not review his decision, even if they are of opinion that it was erroneous; *Reg. v. Blanshard (a)*; *Reg. v. Goodrich and Others (b)*. The decision was not on a point preliminary to the hearing, in which case, if the sessions were wrong in point of law, this Court would set them right; but it was on the very point on which the appeal was made, viz., whether, under the terms of the act, the company was properly assessed. It was only by exercising his jurisdiction that the Recorder could decide the point.

But, secondly, even if the decision was on a preliminary point, it was right in point of law. The question turns on the construction to be put on the 9 & 10 Vict. c. cxxvii. (c). The only question which the Recorder had to decide was,

(a) Q. B., Hil. Vac. 1849, cited from 18 Law Journ. M. C. 110, N. S.

(b) Q. B., Trin. Term, 1850, cited from 19 Law Journ. Q. B. 413, N. S.

(c) The following are the material sections of the 9 & 10 Vict. c. cxxvii., intituled "An Act for the improvement of the Sewerage and Drainage of the borough of Liverpool, and for making further provisions for the sanitary regulation of the said borough."

Sect. 151 empowers the town council to make sewer rates, paving rates, and general rates;

and sect. 152 specifies the property subject to be rated, and the manner of levying the rates, which is to be upon all property in the borough, "according to the full net annual value thereof respectively, the same to be ascertained in manner hereinafter mentioned."

Sect. 156 enacts, "that the net annual value of all such property in respect of which the person who shall hold, use, or occupy the same, is liable to be rated under the provisions in this act contained, shall be ascertained according to the meaning of the words 'net annual value,' as de-

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whether the rateable value of the property of the appellants was the same as that at which they were assessed to the relief of the poor in the year preceding; and if that were so, he was concluded from any further inquiry as to the rateable value. The intention of the Legislature was, that the value at which property was assessed in the poor rate of the year preceding should be conclusive; and that the remedy for an excessive valuation should be by appeal against the poor rate; by which means the expense of a double appeal would be saved.

Pashley, in support of the rule. 'The Recorder has not heard the appeal; for he conceived himself bound by the

scribed in an act of Parliament passed," &c. (6 & 7 Wm. 4, c. 96); "and shall in all cases, for the purposes of this act, be taken and estimated according to such value as the same is or shall be rated or assessed in the rate or assessment for the relief of the poor in the year preceding."

Sect. 158 empowers the council to cause a valuation to be made of the annual rent or value of any property "omitted from the poor rate," or which "shall be erected, completed, or occupied after the rate shall have been made for the relief of the poor in any year," and to cause the same rates to be made as "if such property had been rated or assessed to the rate for the relief of the poor."

Sect. 170. "That if any person shall think himself aggrieved by any rate made under the authority of this act, or by any matters included in or omitted from the same, he may appeal to the next general or quarter sessions of the peace for the said borough, but no such appeal" "shall be en-

tertained at such" "sessions, unless fourteen clear days' notice in writing of such appeal" "be given by the aggrieved party to the said council, by leaving the same at the office of the said town clerk;" and at the "sessions, for which any such notice of appeal shall be given, the Court shall proceed to hear and determine the appeal in a summary way, except when the Court shall think fit to adjourn the appeal," &c.

Sect. 171. "That the Court of quarter sessions shall, in any appeal against any rate made under the authority of this act, have the same powers of amending or quashing such rates as are by law vested by such Court for amending or quashing the rates for the relief of the poor within their jurisdiction upon appeals against such rates, and shall likewise have in any such appeal the same power of awarding costs," &c.

By the 220th section, no proceeding under the act is to be removed by certiorari.

terms of the 156th section to reject all evidence of the rateable value of the property except the last poor rate assessment. This was a decision upon a preliminary point; and this Court will, therefore, review the Recorder's decision if it is wrong in point of law. [He referred to *Rex v. Justices of Cumberland* (a).]

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The object of the 156th section was to save the town council the expense and difficulties attendant on a valuation of the net annual value of the property subject to the rate, and to make the poor rate assessment of the preceding year *primâ facie* evidence of that value, subject to such proof as the appellants might adduce of the deterioration in value since that assessment was made. The correct rule of construction is to give every clause and word of an act of Parliament their full effect, unless by so doing the construction arrived at is inconsistent with the manifest intention of the Legislature. The 156th section is divided into two branches; the first is useless if the second is to have the construction contended for. The language of this section is the same as that of the 6 & 7 Wm. 4, c. 96, s. 1. If the Legislature had intended that the assessment to the poor rate should be conclusive evidence, they might have so expressed it. If such was their intention, sect. 170 loses its force. Sect. 171 may possibly only apply to cases of deviation from the value assessed in the poor rate, and is, therefore, not relied on. The construction sought to be put upon the 156th section by the appellants is the more reasonable, as cases might arise in which great hardship would be inflicted if the parties were bound by the preceding rate for the assessment of the poor; as, *ex gr.*, where a public-house has been deprived of a license, or a warehouse destroyed by fire. By the 163rd section, the town council may make prospective rates to extend over a series of years; and by the 183rd section they may borrow money and charge it on the rates.

Cur. adv. vult.

(a) 4 A. & E. 695.

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PATTESON, J.—This was an appeal against a rate made by the town council of Liverpool, under statute 9 & 10 Vict. c. cxxvii., and the ground stated by the London and North Western Railway Company (the appellants) was, that they were rated at too large a sum. The sum was the same as that at which they had been rated to the poor rate in the year preceding, which sum they had paid without appeal; and the learned Recorder, considering himself bound by the 156th section of the act, refused to enter into any discussion as to that sum being a proper one, and dismissed the appeal.

A rule nisi for a mandamus directing him to hear the appeal was obtained, upon the ground that the dismissal was, under the circumstances, a declining of jurisdiction, which by the true construction of the act he possessed, and ought to have exercised.

I am of opinion that the dismissal was not a declining of jurisdiction, but a decision upon the hearing of the appeal; and that this Court has no power to issue the writ of mandamus, whether the construction put upon the act by the learned Recorder be right or wrong.

The last case upon this subject, *Reg. v. Goodrich (a)*, draws the true distinction. Where any preliminary step is necessary in order to give the Court of Quarter Sessions power to hear the appeal, and the Court comes to a wrong conclusion of *law*, not of *fact*, in respect to that preliminary step, this Court will interfere by mandamus. Here, however, there is no question as to any preliminary step, but the appeal is duly entered, called on, argued, and decided. Now whether that decision proceeds upon a question of law or of fact is wholly immaterial; it is equally a decision upon the appeal. In the former case, the decision, in effect, is that, by the true construction of the act, the poor rate of the preceding year is conclusive upon the Court and

(a) Q. B., Trin. Term, 1850, cited from 19 Law Journ. Q. B. 413, N. S.

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the parties, as to the valuation of the appellants' premises in the rate appealed against; and therefore the learned Recorder declined to go into evidence as to the propriety of that valuation. This is a declining to hear further evidence, because the evidence already adduced—namely, the poor rate—concludes the parties. I am at a loss to see how this can possibly be treated as a declining of jurisdiction to hear the appeal.

By arrangement between the attorneys on each side, it was agreed that the construction of the act should be the only point to be discussed before the Recorder, and that if he decided to hear further evidence, the case should be adjourned, but if not, the appeal should be dismissed. The first letter of the appellants' attorney mentions an intention to apply to this Court for a mandamus, if the learned Recorder should decide as he has done; but there is no acquiescence by the attorney of the respondents that such application might be made, nor, if there had been, would it have given this Court any power to direct a mandamus to issue.

On this ground, therefore, I think that the present rule must be discharged.

But I think it right to add that, in my opinion, the learned Recorder has come to a right decision. Sect. 156 expressly provides, that the valuation of the property "shall in all cases, for the purposes of this act, be taken and estimated according to such value as the same is or shall be rated or assessed in the rate or assessment for the relief of the poor in the year preceding." It is directed, in the earlier part of the section, that the value shall be ascertained according to the meaning of the Parochial Assessment Act; and it is contended that the two parts of the section are to be taken separately, and that the latter relates only to the town council and the assessments to be made by them in the first instance; whereas the earlier part is general, and coupled with sects. 170 and 171—by which the appeal is given, and the Recorder invested with the same powers as

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to amending or quashing the rate as are by law vested in Courts of Quarter Sessions as to poor rates, —leaves the question of value at large with the Recorder on appeal. I do not think that such was the intention of the Legislature, but that the whole of the 156th section must be read together, and must be applied to the question of value, whenever and before whomsoever it may arise.

There are many other matters to which the 171st section will apply; as, for instance, to the fact whether the rate appealed against does assess the appellant in the same sum as the poor rate; and to other cases which might easily be suggested. This is also to be observed that where property is omitted in the poor rate, or has increased in value since that rate, sect. 158 directs that a new valuation shall be made; and on appeal in such a case the 171st section would operate. But there is no provision for the case of property included in the poor rate being diminished in value. Such a diminution might be suggested in all cases, and if the Recorder were to inquire by evidence into the present value on the supposition of such diminution, he would in effect render the 156th section wholly nugatory. If, on the other hand, he were to inquire by evidence into the value at the time the poor rate was made, he would in effect be trying an appeal against that poor rate which has been acquiesced in and paid. It is only for one year that the appellants are concluded; for if there has been a diminution in value, and the assessment to the poor rate of the same year as the rate now appealed against, be too high, an appeal will lie against such poor rate, and the question will then be properly raised; and the rate to be made under the act in question in the following year will be conformable to the decision of such appeal. Thus the valuation under the act will in all cases, except that contemplated in sect. 158, follow the poor rate conclusively; which, in my opinion, is the clear intention of the Legislature.

Rule discharged.

JONES v. IVES.

November 12.

[In the Common Pleas.]

Coram *Jervis, C. J., Maule, J., Williams, J., and
Talfourd, J.*]

T. JONES moved for a rule requiring the Master to grant his allocatur of the costs of this case, and to allow the plaintiff to sign judgment.

The following facts appeared upon the affidavit in support of the rule. Upon the trial of the cause at the sittings in London in Easter Term last, a verdict was taken for the plaintiff for 250*l.* subject to be reduced by the arbitrator, to whom the cause and all matters in difference between the parties were referred by an order of nisi prius. That order provided that the costs of the cause, to be taxed, should abide the event, and that the costs of the reference and award, to be taxed, should be in the discretion of the arbitrator. The arbitrator made his award on the 13th of June, and thereby, after directing that the verdict should stand for the plaintiff for 50*l.*, and finding that there were no matters in difference between the parties except the cause, ordered that the defendant should pay the plaintiff the costs of the reference and award. On the 7th of November, the Master taxed those costs, but refused to give his allocatur, as judgment was not signed, and refused to allow the plaintiff to sign judgment, as the time for moving to set aside the award—viz., the whole of Michaelmas Term,—had not expired. Application had been made on the 15th of June, to *Williams, J.*, for leave to sign judgment, but his Lordship refused to interfere.

Where a cause and all matters in difference are referred by an order of nisi prius, which orders that the costs of the cause shall abide the event, and the costs of the reference and award, to be taxed, shall be in the discretion of the arbitrator, judgment cannot be signed, nor the Master's allocatur for the costs be obtained, until the end of the Term next after the making of the award.

T. Jones. The plaintiff is not bound to wait till the end of the term. [*Jervis, C. J.*—If the cause alone had been referred, the plaintiff might have signed judgment after the expiration of the first four days of Term; but as all matters

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in difference were referred as well as the cause, he cannot do so till the end of the Term.] It is admitted that the defendant has the whole of the Term for moving to set aside the award; but the plaintiff is not bound to leave the award incomplete until that time has elapsed. [*Jervis*, C. J.—The plaintiff can have his costs taxed during the Term, and put himself in a condition to sign judgment as soon as the Term ends.] The costs cannot be said to be taxed until the allocatur is granted. *Cromer v. Churt* (a), and *Little v. Newton* (b), are authorities in support of the present application. [*Jervis*, C. J.—The remark of *Maule*, J., in *Hobdell v. Miller* (c), is more applicable. “How can the plaintiff,” he says, “have costs taxed before it is certain that he can sustain his award?”] The case of *Little v. Newton* is more recent; and overrules the dictum of *Maule*, J., in *Hobdell v. Miller*. [*Maule*, J.—In that case the reference was made by an order of nisi prius; in *Little v. Newton*, it was made by articles of agreement (d).] That distinction, it is submitted, is not material; for the jurisdiction of the Court only arises upon the submission, whether it be by order or agreement, being made a rule of Court.

JERVIS, C. J.—The two cases are quite reconcilable in the manner pointed out by the Solicitor General in *Little v. Newton*, viz.: that in the one case the reference was by an order of nisi prius, while in the other it was made by agreement between the parties. It is perfectly plain and beyond all question, that where the submission includes the cause and all matters in difference a party has till the end of the Term to move to set aside the award. If a reference be made by agreement only (e), the costs may be

(a) 15 M. & W. 310; S. C. *div. nom.* 3 D. & L. 672.

(b) 1 M. & G. 976; S. C. 2 Scott, N. R. 159.

(c) 2 Scott, N. R. 163, 165. See 1 M. & G. 978, note (b).

(d) In *Little v. Newton*, the articles of agreement contained no

clause for making the submission a rule of Court; but it was nevertheless made a rule of Court; see 1 M. & G. 977, and 977, n. (a).

(e) That is, *semble*, without the clause of consent to its being made a rule of Court.

taxed at once by the Master and are to be treated as part of the award; but when parties refer a cause as well as all matters in difference by an order of Nisi Prius, and the costs are to abide the event, they are not so much a part of the award, as the legal consequence of and incident to the event. Here the Master is asked to tax the costs in a case where both the cause and matters in difference have been referred; and he rightly says he cannot do that, because the plaintiff cannot sign judgment until the time for setting aside the award has elapsed, and the costs cannot be taxed until judgment is signed.

The rest of the Court concurred.

Rule refused.

BELL v. The PORT OF LONDON ASSURANCE COMPANY.

November 9,
16, 21.

[*Bail Court. Coram Patteson, J.*]

THIS was a rule obtained by the plaintiff, who sued in formâ pauperis, calling upon his late attorney to shew cause why he should not pay the costs of the day, occasioned by his negligence.

The jurat of the affidavit in support of the application was as follows: "Sworn by the deponent," A. B., "at Glasgow, in the county of Lanark, in Scotland, the fifth day of June, eighteen hundred and fifty years, before me, G. R. Tennent, a commissioner for Scotland, for taking affidavits in the Court of Queen's Bench at Westminster."

Hawkins shewed cause. The jurat is defective in two points. First, it does not sufficiently state when the affidavit was sworn. It does not state from what epoch the "eighteen hundred and fifty years" are to be computed. In the late

The jurat of an affidavit was in the following form:—
"Sworn by"
"at Glasgow, in the county of Lanark, in Scotland, the fifth day of June, eighteen hundred and fifty years, before me,"
G. R. T., "a commissioner for Scotland, for taking affidavits in the Court of Queen's Bench at Westminster." *Held*, that the date and the authority of the commissioner were sufficiently stated.

The privilege of a plaintiff suing in formâ pauperis does not extend to a step collateral to the cause, such as a rule calling on his attorney to pay the costs of the day incurred through his negligence.

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case of *In re Lloyd* (a), a jurat, stating that the affidavit was sworn by the deponents "at my Chambers, Rolls Gardens, Chancery Lane. Dated this 24th day of April, 1850," was held bad, because it did not shew when the affidavit was sworn. So in the *Duke of Brunswick v. Harmer* (b), an affidavit was for the same reason rejected, the jurat stating that it was "sworn the —— day of November, 1849."

PATTESON, J.—Does it not sufficiently appear in this case that the year 1850 is intended? Suppose the word "years" had been left out, could there have been any doubt as to the meaning? I think this is not a sufficient objection, for I do not see how I can put a different construction upon the words than as meaning the year 1850.

Hawkins. Secondly, the jurat does not shew that the affidavit was sworn before a person authorized to administer an oath. The 3 & 4 Wm. 4, c. 42, s. 42, it is true, gives the superior Courts the same power to grant commissions for taking and receiving affidavits in Scotland and Ireland, as they already had in the counties in England and Wales: but here the person before whom the affidavit is sworn is described as a commissioner "for Scotland;" and it would seem, from that statement, that he was appointed by a Scotch Court to take "affidavits in the Court of Queen's Bench at Westminster;" an appointment which will not be recognised by this Court. [The Court called on]

Burnie, in support of the rule. "A commissioner, &c." has been held to be a sufficient description of a party's authority to administer an oath (c). The words after "commissioner" may be rejected as surplusage; or, if not, the word "for" Scotland may be read as "in" Scotland, which will make the description sufficient. Commissioners

(a) *Ante*, p. 545.

(b) *Ante*, p. 505.

(c) See *Burdekin v. Potter*, 1

Dowl. 134, N. S.; S. C. 9 M. & W. 13.

in this country are never appointed for the whole of England, but only for one or more counties; and the Court presumes that they have acted within their jurisdiction. The act of Parliament does not require any particular form of jurat.

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Hawkins, in reply. Where an "&c." is alone added to the word "commissioner," the Court may properly presume that the commissioner acted within the limits of his authority; but no such presumption can arise when that authority is defined, and the definition shews that the commissioner has no authority. In *Hill v. Royston* (a), an affidavit sworn before "me, a commissioner," without an &c., was held insufficient. An &c. has been held, after verdict, to supply the place of a similiter in an issue (b).

PATTESON, J.—If the words had been "*in* Scotland," I should not have had any doubt of the sufficiency of the jurat; for then it would have stated the person to be "a commissioner for taking affidavits in the Queen's Bench, Westminster, in Scotland." I think, however, that I can scarcely read "*for* Scotland" as meaning that the person has been appointed by a Scotch Court to do what they could not empower him to do. The fair construction seems to me to be, that he is such a commissioner for taking in Scotland affidavits in the Court of Queen's Bench, Westminster, as the act of Parliament gives this Court the power to appoint. The objection, therefore, fails.

Hawkins then shewed cause on the merits.

Burnie, in support of the rule.

PER CURIAM.

Rule discharged, with costs.

(a) 7 Jurist, 930. Trin. Term, and *Handford v. Handford*, id. 1843, Bail Court, 473. See also 2 *Wms. Saund.*

(b) See *Swain v. Lewis*, 3 Dowl. 319 a, n. (c), 6th ed. 700. *Brook v. Finch*, 6 Dowl. 313,

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On a subsequent day,

Burnie moved that the rule should be discharged without costs, as the plaintiff was suing in formâ pauperis. The rule was not moved with costs. He referred to *Pratt v. Delarue (a)*.

PATTESON, J.—The privilege of a pauper plaintiff to be exempt from costs only extends to a step in the cause. Here the application is on a collateral matter against his own attorney.

Cur. adv. vult.

PATTESON, J.—I have considered this matter, and am of opinion that nothing turns in it upon the privilege of a plaintiff suing in formâ pauperis to be exempt from costs. The ground of the application in respect of which the costs are incurred is, that by reason of the misconduct of the attorney, the plaintiff had become liable for the costs of the day. The very foundation, therefore, of the rule is a proceeding in respect of which the plaintiff is not exempt from costs by reason of his privilege as suing in formâ pauperis. I cannot, therefore, see how it is possible to contend, that this is a proceeding to which the privilege of being exempt from costs should extend.

The privilege of a pauper plaintiff being then put out of the question, I think that this application must follow the rule in similar cases, where the affidavits are fully answered, and be discharged with costs.

Rule discharged, with costs.

(a) 10 M. & W. 509; S. C. 2 Dowl. 322, N. S. See *Foster v. The Bank of England*, 6 Q. B. 878; S. C. 2 D. & L. 790.

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REGINA, on the Prosecution of W. DAVIS, v. MILL.

November 18.

[In the Common Pleas.

Coram *Jervis, C. J., Maule, J., Williams, J., and
Talfourd, J.*]

SCIRE FACIAS (issued the 7th of January, 1850) to repeal a patent. The declaration—after setting out the letters patent, which bore date the 29th of June, 1846, and were granted to the defendant “for improvements in instruments used for writing and marking, and in the construction of inkstands,”—suggested, (1) that the grant was contrary to law, as a part of the invention was not the working or making of any manner of new manufacture; (2) that the grant was prejudicial and inconvenient to the public, as a part of the invention was useless; and also, (3) that the defendant was not the first and true inventor of the said invention within this realm; (4) that the said invention was not, at the time of making the said grant, a new invention, as to the public use and exercise thereof within England; (5) that the said invention was not in-

The notice of objections in sci. fa. to repeal a patent, is not part of the record, although it forms part of the transcript sent for trial from Chancery to this Court.

A declaration in sci. fa. to repeal a patent, after stating that a patent had been granted to defendant “for improvements in instruments used for writing and marking, and in the construction of inkstands,”

suggested that the patent was bad, because (1) part of the invention was not of a new manufacture; (2) part was useless; (3) the defendant was not the inventor of the said invention within the realm; (4) the invention was not new, (5) nor invented by defendant; (6) and defendant did not inrol a specification. The defendant traversed the suggestions. The specification claimed eleven inventions: the first six were pens and pencils; the seventh and eighth were “instruments for marking,” and the remainder were inkstands. The notice of objections stated objections to each of the claims; and as to the fifth, sixth, and eighth, alleged that they were not new nor useful, and that the seventh was useless and insufficiently described. After issue joined and before the trial, the defendant inrolled a disclaimer of the fifth, sixth, seventh, and eighth claims. *Held,*

First, that the notice of objections could not be resorted to for the purpose of narrowing any of the issues to one claim.

Secondly, that the defendant was not bound to plead the disclaimer puis darrein continuance.

Thirdly, that the disclaimer was receivable in evidence upon the trial of the sci. fa.

Fourthly, that it formed part of the specification, as the prosecutor, in putting in the latter, in effect put in the former also.

Fifthly, that the title of the patent was not more extensive than the invention described in the specification as amended by the disclaimer; inasmuch as the first six articles were instruments for marking as well as for writing.

Whether an action commenced after disclaimer for an infringement before disclaimer will lie, *quære.*

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vented and found out by the defendant; and (6) that the defendant did not file a specification of his invention within six months. By means of which said premises the said letters patent are and ought to be void, &c.

The defendant pleaded six pleas, traversing the suggestions.

The specification, which was inrolled on the 29th of December, 1849, claimed eleven distinct inventions: 1. A pencil case; 2, 3, and 4. Pen-holders; 5. A metal pen; 6. A notched metal pen; 7 and 8. Instruments for marking (stamping); and 9, 10, and 11. Inkstands.

The notice of objections filed (*a*) (under the 5 & 6 Wm. 4, c. 83, s. 5) with the declaration contained separate and distinct objections to each of the claims. The objections taken to the fifth, sixth, and eighth claims were, that they were neither new nor useful; and to the seventh, that it was useless, and that the description of it given by the specification was insufficient.

Issue was joined in Hilary Term, 1850; and the record was entered for trial at the sittings after that Term. It was afterwards postponed until the sittings after Easter Term, and was made a remanet to the sittings after Trinity Term, in the same year. Meanwhile, on the 23rd of April, the defendant inrolled a disclaimer of the fifth, sixth, seventh, and eighth parts of his invention (*b*). Upon the trial, before *Wilde*, C. J., at the sittings in Middlesex after Trinity Term, the prosecutor confined himself to proving the want of novelty of the sixth claim; but upon the specification being put in, the defendant admitted the want of novelty, but insisted that the disclaimer, of which he tendered

(*a*) For the present practice in sci. fa. for repealing patents, see 12 & 13 Vict. c. 109. The declaration and notice of objections are now, by sect. 30, delivered and not filed.

(*b*) It appeared upon the brief of the defendant's counsel, that the defendant, on the 13th of

April, presented a petition to the Solicitor General for leave to disclaim those parts of the invention; and that the prosecutor, who had been served with a notice of the application, attended before the Solicitor General and opposed it.

an office copy, was part of the specification, and must be read with it. The learned Judge, however, thought that the disclaimer should have been put upon the record, and directed the jury to find a verdict for the Crown; reserving leave to the defendant to move to set aside the verdict and enter it for himself.

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Byles, Serjt., having on a former day in this Term obtained a rule accordingly,

Butt and *Webster* shewed cause. The disclaimer was not admissible in evidence upon any of the issues on the record. It was a matter of defence arising after issue joined, and should, therefore, have been pleaded puis darrein continuance. [*Maule*, J.—Why so? does the declaration contain any suggestion as to the sixth claim?] None of the suggestions refer particularly to that or to any other claim; they refer only to the invention generally. But the notice of objections alleges that the sixth claim is neither new nor useful, and as the 5 & 6 Wm. 4, c. 83, s. 5, requires that the notice of objections shall be filed with the sci. fa., it is made part of the record; and, therefore, the Court will look to it for the purpose of ascertaining what was, in fact, in dispute between the parties under the issues joined. [*Jervis*, C. J.—Is not a notice of objections, under this act, like the particulars of demand in an ordinary action; annexed like them to the record, but forming no part of it?] The analogy is not in all respects correct; for the record, which is sent to this Court for trial from Chancery, consists of a transcript of the proceedings filed in the Petty Bag Office, among which is the notice of objections, which, therefore, is as much a part of the record as the pleadings. It appears, therefore, upon the whole record—reading the pleadings and the notice of objections together,—that one of the questions upon which the parties went to trial was whether, at the time when issue was joined, the sixth claim was new or not. The subsequent proceedings to save the

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patent by inrolling a disclaimer did not alter the issues which had been joined. [*Maule, J.*—The first section of the act provides, “that no such disclaimer or alteration shall be receivable in evidence in any action or suit (save and except in any proceeding by scire facias) pending at the time when such disclaimer or alteration was inrolled.” Does not the exception in this proviso shew that the disclaimer ought to have been admitted here?] The meaning of the act is only that the disclaimer may be received upon the trial of a sci. fa., if it be in other respects admissible, having regard to the state of the record. [*Maule, J.*—The act says that the disclaimer, when inrolled, “shall be deemed and taken to be part of such letters patent or such specification.” Suppose an infringement of a patent; after the infringement, a disclaimer; and after that, an action for the infringement: could that action be maintained?] The Court of Exchequer held, in *Perry v. Skinner* (a), that it could not; and that to avoid the manifest injustice of making a man a trespasser by relation, the words “from thenceforth” must be introduced, and that the act must be read as providing that the disclaimer shall “from thenceforth be deemed and taken,” &c.: and in *Stocker v. Warner* (b), *Cresswell, J.*, appears to have approved of that mode of construing the act. [*Jervis, C. J.*—The proviso which makes it inadmissible in evidence would then be unnecessary; for if the disclaimer is to operate only from the date of its inrolment, it could not, even if the proviso did not exist, be used in any proceeding pending at the time when it was inrolled.] The construction adopted by the Court of Exchequer prevents the injustice which would arise, if the defendant were at liberty to avail himself at the trial of a disclaimer, which he might have inrolled without the knowledge of the prosecutor the day before. At all events, the defendant is in this dilemma, if the disclaimer was not admissible, cadit quæstio, and the verdict

(a) 2 M. & W. 471.

(b) 1 C. B. 148, 167.

must stand for the Crown: if it was admissible, it proved the prosecutor's case; for it is an admission by the defendant, that when issue was joined the patent covered an invention which was neither new nor useful. [*Jervis*, C. J. —What provision is there with respect to costs in a sci. fa.?] The prosecutor gives a bond with two sureties to the Clerk of the Petty Bag Office; and an application to the Master of the Rolls is perhaps necessary to have the bond put in suit.

Further, the disclaimer has made the patent bad; for the title of the latter is now more extensive than the invention. If a patent be obtained for three things, and the specification describe only two, the patent is clearly bad. So, if there be a substantial variance between the title of the patent and the description of the invention in the specification; *Croll v. Edge* (a). Here, the disclaimer excludes from the specification the invention of "instruments for marking," which are mentioned in the title of the patent; and the suggestion in that title, that the patentee had invented such instruments, is a fraud upon the Crown.

Byles, Serjt., and *Montague Smith*, in support of the rule. The disclaimer need not have been pleaded puis darrein continuance. If the specification and objections had been set out upon the record, it might have been necessary so to plead it; the issues upon the record, however, do not refer to any particular portion of the subject-matter of the patent, but only raise the question, whether the patent, generally, be valid, and the invention for which it was granted be a new manufacture. The pleas now upon the record are as necessary since the disclaimer as they were before it, and must have been repleaded, even if the disclaimer had been pleaded puis darrein continuance. The notice of objections is, as already suggested by the Court, like the particulars of demand in an ordinary action; and, although sent to this Court from Chancery with the record, forms no part of it, and cannot be looked at for the purpose of

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(a) Com. Pleas, Hil. Vac. 1850, cited from 19 Law Journ., C. P. 261.

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narrowing the issues. The prosecutor was not bound by the notice of objections which he first delivered ; and after the disclaimer he might have filed another notice. To prove the suggestions in the declaration, the prosecutor was obliged to put in the specification ; but the disclaimer is made by the act part of it, and ought, therefore, to have been put in and read with it. Besides, the act expressly provides that the disclaimer shall be admitted in evidence upon the trial of a sci. fa. When read, then, it would have shewn that the only portions of the invention which the prosecutor contended were not new, formed no part of the defendant's invention covered by the patent ; and therefore, the defendant was entitled to a verdict upon the issues. The Court of Exchequer, in *Perry v. Skinner* (a), did violence to the language of the statute ; but the injustice which that strained construction was intended to prevent, may perhaps not appear quite so manifest as that Court supposed it, when it is borne in mind that the party sought to be protected was a person who had availed himself of a technical defect in the validity of a patent to pirate what was admitted to be a new and useful invention of another. It is not, however, necessary in this case to overrule *Perry v. Skinner*, for no injustice or inconvenience can arise from understanding the language of the statute in its ordinary meaning. A disclaimer cannot be obtained behind the back of the prosecutor, as suggested on the other side ; since the act provides that the Attorney or Solicitor General shall direct advertisements of the intended disclaimer to be issued. The prosecutor was not bound to go to trial ; and upon the enrolment of the disclaimer he should not have done so, as it was impossible that he could get judgment. That step was useless, even for the purpose of getting costs ; for no costs are given in sci. fa. [*Williams, J.*—The prosecutor's proper course was to give notice that he would discontinue, and that he would oppose any application to put the bond in suit.]

(a) 2 M. & W. 471.

With respect to the title of the patent, the seven claims which still remain in the specification satisfy it: for pens and pencils are instruments for marking as well as for writing.

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JERVIS, C. J.—I am of opinion that this rule ought to be made absolute. Two principal questions have been raised in this case: first, what is the proper construction to be put upon the first section of the 5 & 6 Wm. 4, c. 83? and, secondly, whether the disclaimer was admissible in evidence upon the trial of the issues upon the record.

If it had not been for the case of *Perry v. Skinner*, I confess it would have appeared to me, upon reading the terms of the act, that it was quite plain and clear that the intention of the Legislature was to allow a specification on which a doubt was entertained, to be amended pending an action, and after proper precaution taken by the law officers of the Crown by issuing advertisements and imposing such terms as they in their discretion might think fit; and that when the disclaimer was perfected, it should be deemed and taken to be part of the specification. If the construction adopted in *Perry v. Skinner* is to be put upon the act under all circumstances, then as the disclaimer would date only “from thenceforth,”—that is, from the date of its enrolment,—the proviso in the first section, which says, “that no such disclaimer or alteration shall be receivable in evidence in an action or suit (save and except in any proceeding by sci. fa.) pending at the time when such disclaimer or alteration was inrolled,” would be totally inoperative and useless. If, however, we are to construe the act according to the plain and natural and common sense construction,—and there is nothing which renders that construction absurd,—I think that the disclaimer must be read as part of the specification, and as part of it from the time when the patent was granted. And read in this way, it is not true that the patent includes matter which is old, as well as matter which is new. The case stands thus: there is a

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patent for three distinct inventions; in which eleven things are stated to be new. The defendant says; "as to seven of them I have a good title, but I do not claim the four others as you suppose; for, reading the disclaimer with the specification, you will see that no right is claimed in respect of them, but only in respect of the remaining parts of the inventions."

But it is said, if this is so, and the disclaimer is to be so read, the patent is void, because it is for three things, and the specification is only for two; so that the patentee has not properly complied with the conditions of the patent. It may be doubtful, however, whether in truth the disclaimer is a disclaimer of the specification only. The act of Parliament speaks of a disclaimer in the "title of the invention" as well as in the specification; and this disclaimer might possibly be held to be a disclaimer of that kind. But whether it be so or not,—whether the patent now stands with its original title, or as a patent for instruments for writing and inkstands only,—it is clear that the specification complies with the title. The specification, as amended, is for "improvements in instruments used for writing," by pens and pencils, in "instruments used for marking," by pens and pencils, and in "the construction of inkstands." It is said that the original specification shews that pens and pencils were not intended to be described as "instruments for marking," and that the specification does not now shew what the "instruments for marking" are, to which the patent applies. But, on reading the specification and disclaimer together, I find that there are certain things described, the first, second, third and fourth of which are new, and the fifth, sixth, seventh, and eighth are old; and although the latter satisfy the term "marking," yet so do the former also. The specification, therefore, is as large as the patent or its title, and satisfies the condition of the patent, by describing the entire invention.

The only other question is, as to the admissibility of the disclaimer upon the pleadings as framed. If the notice of

objections be part and parcel of the record, it is plain that an issue was raised by the objection to the sixth claim, and must be tried by the jury : but it is a mistake to say that it is part of the record. I think it is rather like the particulars of demand in an action ; for it gives the defendant an intimation of the objections which he has to meet at the trial, and precludes the prosecutor from raising any others. Now what are the issues? The scire facias sets out the patent, but not the specification. If the defendant had pleaded non concessit, he would have been beaten on the production of the patent, because the patent is set out on the record. Then, what is the question to be tried? The patent is set out ; but what it is for cannot be ascertained till the specification is produced. When the prosecutor reads part of it, and says “you claim this as new,” the defendant says, “no, read on ; you will find that I describe that as old by my disclaimer.” It is plain, therefore, that it is not included in the patent ; and therefore, it is not true that the patent has been granted for something that is not new. I regret that I am bound to question, (though I only do so indirectly), the decision in *Perry v. Skinner* (a) ; but for the reasons I have stated I think that this rule should be made absolute.

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MAULE, J.—I also think that this rule should be made absolute. There are three main questions in this case : the first turns on the construction of the 5 & 6 Wm. 4, c. 83 ; the second is, whether a disclaimer, supposing it to be generally admissible in evidence, is admissible on an issue joined before it had been made ; and the third, whether the specification, as amended by the disclaimer, is a specification which sufficiently describes the invention according to the title of the patent. With respect to the construction of the statute, the words seem very clear ; and so they were considered in *Perry v. Skinner* : for in that case the Court of Exchequer adopted a different construction only

(a) 2 M. & W. 471.

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on account of the inconvenience which they thought would result from understanding them in their ordinary meaning. But, supposing no inconvenience would follow, the Court of Exchequer do not seem to have intimated any doubt that the plain and ordinary construction ought to prevail. I think that when the language of that statute is carefully considered, the inconvenience which that Court apprehended from it will not be found to arise. As to the literal construction, the words are very clear when taken together. The statute gives, not an absolute power to any party to enter a disclaimer, but a power to appeal to the discretion of the Attorney General, who may grant or refuse leave to enter a disclaimer according as he, acting as a judicial officer and on behalf of the public, shall determine that that which is sought to be done, ought or ought not to be done. This enactment, therefore, must be taken as providing means for preventing the many inconveniences which have been suggested; for the Attorney General may refuse, or only provisionally grant, power to the patentee to disclaim. Then, that power being given, the statute makes a further provision as far as individuals are concerned, viz., "that any person may enter a caveat, in like manner as caveats are now used to be entered, against such disclaimer or alteration; which caveat being so entered shall give the party entering the same a right to have notice of the application being heard by the Attorney General," &c. It does not say that the disclaimer upon being entered shall be part of the specification, but only that "such disclaimer or memorandum of alteration, being filed by the said clerk of the patents, and inrolled with the specification, shall be deemed and taken to be part of such letters patent or such specification in all Courts whatever." That is, that those who are called upon to consider what is the effect of the patent and specification, are bound by the act of Parliament to deem and take the disclaimer to be part of the patent or specification, though it is inrolled subsequently. That this is the true construction of the statute is, I think, proved by the

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words which follow, viz., "Provided also, that no such disclaimer or alteration shall be receivable in evidence in any action or suit (save and except in any proceeding by scire facias) pending at the time when such disclaimer or alteration was inrolled, but in every such action or suit the original title and specification alone shall be given in evidence, and deemed and taken to be the title and specification of the invention for which the letters patent have been or shall be granted." Now, if there were any doubt as to the construction of the former words, this would clear it up; for it shews manifestly that, with respect to the alternative not provided for—viz., when the disclaimer is made not pending an action or suit,—that shall not happen which but for the proviso would not have happened with respect to pending suits. In other words, from the clause of the act which provides that when the disclaimer is made pending a suit, the original title and specification alone shall be given in evidence, it follows as a necessary consequence, that, in cases in which it applies, but for it, not the original title and specification, but the amended title and specification, would have been "deemed and taken" to be the original title and specification. Taking, then, the literal sense of the section, there is no doubt or difficulty in putting a construction upon it.

Let us now consider whether we are obliged to put any other construction upon it. This is a scire facias; that is, a proceeding in which a person takes upon himself the part of a public prosecutor, for the purpose of questioning the validity of a patent. It is admitted that there may be a patent for a meritorious invention, which may be affected by some legal infirmity, arising from the strictness of the Patent Laws; and it was to meet such a case, and to enable the patentees to avoid the consequences of this strictness, that this statute was passed. When, therefore, a person comes forward on behalf of the public, and brings a scire facias, if the patent be for some useful invention (such as this is admitted to be), but which has some vice, such as that imputed here,—viz., that although some things are new

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and useful, yet inasmuch as the patentee has made a mistake, in claiming some things which have been discovered before,—it seems to me that such a case is meritorious within the act, and that such a person is a fit person to be protected. And it is to be observed that, except for the practice of requiring a bond to be given by the defendant, the prosecutor, as soon as the disclaimer, or any alteration which has healed the vice of the patent, is inrolled, would have all he asks. He does not pretend to say that the patent is null and void to all intents and purposes, and ought not and cannot be amended. He must take the patent as he finds it; and the patent is subject to this law, that as soon as the disclaimer is inrolled, every thing which the prosecutor ought to wish for on behalf of the public has been done. So that, when the only fault is healed, the patent, instead of being a bad patent, which is a bad thing, is a good patent, which is a good thing. Therefore, as his object is only to get a bad patent cancelled, he has got all he wishes for,—for he has the patentee *confitentem reum*,—except that which arises, not indeed in the regular course of proceeding, because no costs are given to a prosecutor, but with respect to the bond for costs. Now this appears to be a matter in the discretion of the Master of the Rolls or the Attorney General; and we must presume that that discretion will be properly exercised. I do not see, therefore, that that injustice would arise which has been suggested by the Court of Exchequer.

The principle of this enactment seems to me to be, that when there is some matter which the Attorney General in his judgment may consider to be such a matter as may properly be amended by a disclaimer or alteration, in such a case the patent shall not be avoided, but may be amended. Before this act, the Master of the Rolls had the power of amending letters patent in some trifling matters: under this act, however, an amendment must be made with more formality. It is done before the Attorney General, who may require notice of the disclaimer to be advertised; and private persons may enter a caveat against it and attend before him to

oppose the disclaimer; so that every precaution is taken to prevent injustice being done. The spirit of the act, therefore, is this; that inasmuch as there may be trifling defects in some small and insignificant portions of a patent which is in all other respects good, in such case amendments may be made. This consequence, however, would, but for the proviso, have followed, viz., that if pending an action for the infringement of a patent an amendment was made, the defendant, who might perhaps be considered to have done no harm, and no more than he had a strict right to do, in infringing a bad patent,—though it may be doubted whether his conduct in doing so were altogether commendable,—might have a good defence taken away from him by the plaintiff's disclaimer, which would not only make a patent good which otherwise would be bad, but would also inflict costs on the defendant. That was thought a mischief, and was provided for by the act of Parliament: but the exception in the proviso shews, that in the cases to which the proviso does not apply the general enactment shall prevail,—which is, that when the proper authority determines that an amendment is proper, it shall take place, and have effect as if it was part of the original patent. The proviso applies to actions, and not to scire facias. In the latter the patentee is passive; the prosecutor complains of the badness of the patent, and asks to have it repealed or cancelled; or, if an amendment would heal it, he must be taken to be quite contented with an amendment. The only injustice that could possibly happen, would be with respect to the costs of the proceeding. It sometimes happens that the law takes that minute care about costs which parties and their advisers think it ought to take; but here it is otherwise. They form no part of the judgment of the Court; and if they are to be got at all, it can only be by a proceeding, which a party would probably not be enabled to take, unless it was just that he should get them. Here a portion of the costs may, perhaps, be justly recoverable by the prosecutor.

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As to the question whether the disclaimer was admissible upon the issue as to the novelty of the patent, or whether it ought to have been pleaded *puis darrein continuance*: the specification is for instruments used for writing and marking; and when it was given in evidence, it was necessary and proper to admit the disclaimer; for the specification as amended by it, is the specification now in force. With respect to the title of the patent being more extensive than the specification, it is sufficient to say that the Court can see in the latter enough to satisfy every part of the title. The only other observation I have to make is, as to the plaintiff pleading the disclaimer *puis darrein continuance*. I do not see how this could have been done in the present state of the record. If issue had been taken upon the validity of the sixth claim, the disclaimer might have been so pleaded; but when the issues go to the validity, not of some, but of all the claims, I cannot conceive how the disclaimer could be used in any other way than in that in which it was proposed to use it. For these reasons I think that the rule should be made absolute.

WILLIAMS, J.—I am of the same opinion. The 5 & 6 Wm. 4, c. 83, bids us in very plain and unambiguous language to deem and take the disclaimer as part of the specification; and unless we refuse to comply with that bidding, I cannot see how we can come to any other decision; because the prosecutor put in the specification, and all that the defendant asks is, that the disclaimer may be deemed and taken to be part of that evidence.

Then, the question arises, what is the effect of the disclaimer when received? Looking at the specification in all its parts,—of which the disclaimer is one,—the patent claims an invention of which no part is disputed. The defendant, therefore, is entitled to have the issue on the traverse that the invention is new, found for him.

It is said we shall be doing injustice by the course we take. But it is not suggested that the patent can be

cancelled; and, therefore, assuming that the prosecutor had notice of the disclaimer, he had also notice that all further proceedings would be a useless waste of time and money. His proper course was to give notice that he would proceed no further in the cause, and that if any application were made to put the bond in suit, he would resist it. And on the ground that it was contrary to justice that it should be put in suit, he would probably resist it successfully.

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TALFOURD, J., concurred.

Rule absolute.

MEDLICOTT v. WILLIAMS.

November 20,
21.

[*Bail Court. Coram Patteson, J.*]

C. J. DAWSON moved to make a rule absolute to compute principal and interest in an action on a bill of exchange, upon an affidavit of service of a copy of the rule upon a clerk of the defendant at the defendant's warehouse.

Service of a rule to compute principal and interest in an action on a bill of exchange on a clerk at the defendant's warehouse, is insufficient.

It is true that the cases of *James v. Westdale* (a), and *Warwick v. Bacon* (b), are authorities against the present application; but in the latter case a previous decision of the Court of Exchequer, in *King v. Tomlinson* (c), was not brought to the attention of the Court. In that case the Court of Exchequer held, that the service of a rule to compute on a warehouseman, at the defendant's warehouse, was sufficient.

PATTESON, J.—It is desirable that the practice of the Courts should be uniform in such motions.

Cur. adv. vult.

(a) 9 Dowl. 104.

7 M. & G. 961; 2 D. & L. 596.

(b) 8 Scott, N. R. 667; S. C.

(c) 6 Jurist, 999.

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On the following day,

PATTESON, J.—I have spoken to my Brother *Parke* about the case of *King v. Tomlinson* (a), and he informs me that there must be a mistake as to that decision, either of the reporter, or of the Court. He is of opinion that at any rate the decision is not law; and he tells me that the practice of the Court of Exchequer is, to require that the service in such cases should be at the dwelling-house of the defendant. The rule, therefore, cannot be made absolute; but it may be enlarged in order to effect a better service.

Rule accordingly.

(a) 6 Jurist, 999.

November 21.

Ex parte JAMES HOWARD.

[*Bail Court. Coram Patteson, J.*]

Where an attorney has omitted to take out his certificate for more than a year before the stat. 6 & 7 Vict. c. 73, he need not apply for re-admission, but for an order in the usual form under sect. 25, on the registrar to renew his certificate.

ATHERTON moved for the re-admission of an attorney, or for an order on the registrar to renew his certificate; under the following circumstances.

The applicant was admitted an attorney on the 17th of November, 1834, and from that time, down to the year 1841, had regularly taken out his certificate; but had ceased to do so since that period.

Atherton. The question is, whether the application should be made under the 37 Geo. 3, c. 90, to re-admit Mr. Howard as an attorney, or under the recent act 6 & 7 Vict. c. 73, s. 25, for an order on the registrar to renew the certificate. By the 37 Geo. 3, c. 90, s. 31, the omission to take out an annual certificate rendered the admission of the attorney void; but by the recent act, which came into operation in 1843, the former act is repealed, although not retrospectively. By sect. 25, it is enacted, that "if any attorney" "shall neglect to

procure an annual stamped certificate," "then and in such case the said registrar shall not afterwards grant a certificate to such attorney" without the order of the Court or a Judge. The words "shall neglect" apply in the present case, for he has neglected to take out his certificate in 1844, and in each year since. The difficulty is, that when he first omitted to take out his certificate, according to the law then in force, his admission and enrolment became void; and if he were off the roll when the new act passed, section 25 would not apply. In many recent cases, it is understood that orders have been made for the renewal of certificates when the omission to take them out occurred, before the act. [Master *Bunce* stated that such cases had occurred, but that the attention of the officers had not been directed to the point. It was a mere question of form, for the practice had been to order the re-admission as a matter of course. The attorney's name was never off the roll; and the difference of fee paid was only a few shillings.]

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PATTESON, J.—I should be sorry to throw any doubt upon the point; for if re-admission were necessary, it would follow that the persons who have neglected to take out their certificates before the passing of the late act, and who have since been permitted to take them out, are not on the roll of attorneys. It is a mere matter of form, for in truth the renewal of the certificate is virtually a re-admission. I therefore think that it is only necessary to make an order directing the registrar to renew this gentleman's certificate.

Order accordingly.



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HICHINS v. THE KILKENNY GREAT SOUTHERN AND
WESTERN RAILWAY COMPANY.

[In the Common Pleas.

Coram Jervis, C. J., Maule, J., Williams, J., and
Talfourd, J.]

Execution upon a judgment recovered against an incorporated joint stock company within the provisions of the Companies' Clauses Consolidation Act (8 & 9 Vict. c. 16) can be obtained against a shareholder by sci. fa. only.

The Court will not grant a sci. fa. unless it be shewn that sufficient property of the company cannot be found to satisfy the judgment.

The return of nulla bona on writs of fi. fa. is not sufficient evidence that such property cannot be found.

THIS was a rule calling upon George Emery to shew cause why execution upon a judgment recovered in this cause for 3000*l.* should not be issued against him, as a shareholder in the above named company.

The affidavits upon which the rule was obtained stated that final judgment had been signed on the 20th of February, in the present year; that writs of fi. fa. had been issued in Surrey, where the venue was laid, and in Middlesex, where the company had formerly had an office, against the effects of the company, and that nulla bona had been returned. It was also alleged that Mr. Emery was a shareholder. The affidavits did not otherwise shew that property and effects of the company sufficient to satisfy the judgment could not be found.

Slade shewed cause. 'The plaintiff has mis-apprehended his remedy: he should have proceeded by scire facias. The 36th section of the Companies' Clauses Consolidation Act (8 & 9 Vict. c. 16), under which the present application is made, provides that no execution shall issue against a shareholder, except upon an order of the Court made upon motion in open Court (*a*). In this respect its lan-

(*a*) It enacts, that "if any execution either at law or in equity shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any

of the shareholders to the extent of their shares respectively in the capital of the company not then paid up: provided always, that no such execution shall issue against any shareholder except upon an order of the Court in which the action, suit, or other

guage is similar to that of the 13th section of the Banking Act (a) (7 Geo. 4, c. 46), under which it has been held, that a shareholder must be made a party to the record before execution can issue against him. [Maule, J.—In order that there may be some mode of having the question of his liability tried by a jury;]—or brought before a Court of error. In *Bartlett v. Pentland* (b), the Court of Queen's Bench intimated an opinion that the proper course was to enter a suggestion on the roll; but it has since been decided that the plaintiff must proceed by sci. fa.; *Bosanquet*

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proceeding shall have been brought or instituted, made upon motion in open Court after sufficient notice in writing to the persons sought to be charged; and upon such motion such Court may order execution to issue accordingly; and for the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid upon their respective shares, it shall be lawful for any person entitled to any such execution, at all reasonable times, to inspect the register of shareholders without fee."

(a) Which enacts, "that execution upon any judgment in any action obtained against any public officer for the time being of any such corporation or copartnership carrying on the business of banking under the provisions of this act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such corporation or copartnership; and that in case any such execution against any member or members for the time being of any such corporation or copartnership, shall be ineffectual for obtaining payment and satisfac-

tion of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being, to issue execution against any person or persons who was or were a member or members of such corporation or copartnership at the time when the contract or contracts or engagement or engagements in which such judgment may have been obtained was or were entered into or became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained: provided always that no such execution as last mentioned shall be issued without leave first granted on motion in open Court, by the Court in which such judgment shall have been obtained, and when motion shall be made on notice to the person or persons sought to be charged, nor after the expiration of three years next after any such person or persons shall have ceased to be a member or members of such corporation or copartnership."

(b) 1 B. & Ad. 704.

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v. *Ramsford* (a); *Cross v. Law* (b); *Clowes v. Brettell* (c).
[*Jervis*, C. J., referred to *Whittenbury v. Law* (d).] He
was then stopped by the Court, who called upon

Unthank, in support of the rule. It is admitted that, under the Banking Act, a judgment cannot be enforced against an individual shareholder except by sci. fa. But the inconvenience and inutility of that mode of procedure is generally admitted; for the defendant is precluded from pleading any defence which might have been set up in the original action. [*Maule*, J.—He may raise the question of whether he is a shareholder; but you propose to fix him with liability in that character by affidavit, without the intervention of a jury. Suppose the Court were ever so confident that the party sought to be made liable was a shareholder,—nay, that they felt that every argument urged to prove the contrary was extravagant and absurd,—ought he not, nevertheless, to have the opportunity of taking the opinion of a jury or of a Court of error upon the question? *Jervis*, C. J.—He has in the present mode of proceeding no compulsory means of procuring witnesses; for he cannot compel persons to make affidavits. It may be that there exist a number of facts which Mr. *Slade's* client is unable to prove by his own affidavit.] If the Court felt any doubt as to his liability, they might direct an issue or a sci. fa. [*Maule*, J.—That is, we may, if we like, give him the opportunity of questioning our law; but if we do not choose to have our law questioned, we may direct him to be taken in execution at once.] If he does not make any case in disproof of his liability, it is but reasonable that execution should issue against him, without resorting to the expensive and dilatory process of sci. fa. The language of the 36th section of the 8 & 9 Vict. c. 16, authorizes this application in its present form; for it enacts that, “upon

(a) 11 A. & E. 520. In error,
2 Q. B. 972.

(b) 6 M. & W. 217; S. C. 8
Dowl. 789.

(c) 10 M. & W. 506; S. C. 2
Dowl. 528, N. S.

(d) 8 Scott, 661; S. C. 6 Bing.
N. C. 345.

motion in open Court," "such Court may order execution to issue accordingly." The cases decided under the Banking Act are by no means analogous to the present; for the persons against whom execution may issue under it are divided into three classes, viz: First, shareholders for the time being (*a*); Secondly, shareholders when the contract was entered into; and, Thirdly, shareholders when judgment was recovered; and the proviso requiring a motion in open Court upon notice to the party sought to be charged applies only to the last two classes, but not to the first. Now, the shareholders, against whom execution may issue under the Companies' Clauses Consolidation Act, are all shareholders for the time being, and there is no valid reason for putting them in a more favourable situation than the similar members of a banking company. [*Maule, J.*—It is true, under the Banking Act execution may issue against a shareholder for the time being, without motion in Court, because he is primarily and immediately liable. The rule of law being that execution must follow the judgment, a *sci. fa.* must issue to put the party upon the record; but it would be absurd to require a plaintiff to come to the Court for leave to issue execution in such a case. But under the present act, execution is to issue against a shareholder only when sufficient property and effects of the company cannot be found to satisfy the judgment. That may be a proper thing for the Court to judge of; and a motion ought, therefore, to be made for the *sci. fa.*, in order that the party applying may shew that he cannot find sufficient property to satisfy his demand. If he failed to shew that, the Court would not allow execution to issue.] Here the sheriff has returned *nulla bona*; and the Court will receive that as sufficient evidence that the company have no effects. [*Jervis, C. J.*—No; under the Banking Act distinct evidence is always required. *Maule, J.*—The language of the act upon which *Bartlett v. Pentland* (*b*) was decided is similar to the present, the chief

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(*a*) See *Dodgson v. Scott*, 6 D. & L. 27; S. C. 2 Exch. 457.

(*b*) 4 B. & Ad. 704.

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difference being, that there the language was in the affirmative, "execution may be issued," while here it is in the negative, "no such execution shall issue;" and the Court there held, that execution could not issue upon motion, but that a suggestion ought to be entered. There is an incongruity but in issuing execution against a person not on the record; and there is also an injustice in fixing a person to the consequences of a judgment in a cause in which he had no opportunity of denying his liability, and which judgment he has no opportunity of having reviewed.] In cases falling within the provisions of the Joint Stock Companies' Registration Act (7 & 8 Vict. c. 110), the Legislature has expressly provided, that execution may issue without scire facias or suggestion. [*Maule, J.*—No doubt, the Legislature has so provided, and may so provide. But they may also provide, if they please, that execution may issue without motion or notice, or without any proof that the party is a shareholder. It is enough to say that they have not so provided in this case. *Williams, J.*—Is not *Wingfield v. Barton (a)* decisive against you?]

If the Court think that a sci. fa. or suggestion is necessary, it will mould the present rule accordingly. [*Maule, J.*—You do not shew that you are entitled to either; because you do not shew that you cannot get execution against the company's property and effects.] The sheriff's return of nulla bona shews that the company have no effects. [*Maule, J.*—The return of nulla bona is a return made by the plaintiff.]

JERVIS, C. J.—The authorities shew that your application is made in a wrong form. In *Bartlett v. Pentland (b)*,

(a) 2 Dowl. 355, N. S. *Patterson, J.*, in that case refused a rule to issue execution against individual shareholders of a joint stock company incorporated by a private act of Parliament, which enacted that the plaintiff, in an action against their public officer,

might cause execution to be issued against any of the shareholders, but provided that no such execution should issue without the leave of the Court first granted upon motion.

(b) 1 B. & Ad. 704.

the Court of Queen's Bench said, that in such a case a suggestion must be made by leave of the Court; but it was afterwards, upon consideration, held, that a suggestion was not the proper course, but that there must be a sci. fa. This rule must, therefore, be discharged.

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The rest of the Court concurred.

Rule discharged, with costs.

THIRD v. GOODIER.

November 21.

[In the Exchequer of Pleas.

Coram Pollock, C. B., Parke, B., Alderson, B., and
Platt, B.]

A RULE had been obtained upon an affidavit of merits, calling upon the plaintiff to shew cause why the verdict in this case should not be set aside and a new trial had, on the ground of surprise.

The cause, it appeared on the affidavits, was entered for trial at the last Summer Assizes, held at Liverpool, and stood No. 9 in the cause list. The commission day was on Saturday, the 10th of August, but business did not commence till twelve o'clock on Monday, the 12th. As it was expected that the cause which stood first in the list, an action of slander, would occupy two days, the defendant's attorney did not deliver briefs to counsel until Monday. The first cause, however, in consequence of the illness of one of the counsel engaged in it, was postponed; and when the defendant's attorney came into Court on Monday, he found that this cause had been tried as undefended, and that a verdict had passed for the plaintiff. The defendant's counsel thereupon

Where a cause has been regularly tried as undefended, and a verdict taken for the plaintiff, in the negligent absence of the defendant's attorney, the Court will grant a new trial on an affidavit of merits; but only on payment of costs.

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applied to the Court that the cause might be re-tried, but as the plaintiff's attorney refused to consent, the learned Judge declined to interfere.

Atherton shewed cause. The defendant's attorney has shewn no sufficient excuse for not being prepared; he had no right to speculate upon the other causes lasting. [*Platt*, B.—What objection was there to re-try; had your witnesses gone away?] It does not appear that they had; but the plaintiff having obtained a verdict in the ordinary course was not bound to re-try the cause. Where the injury which the plaintiff sustains is the result of his attorney's negligence,—so that the client might recover damages in an action against him,—the Court will not interfere; otherwise they will; *Ayling v. Goldring* (a). [*Pollock*, C. B.—I must dissent from that principle; I cannot see why, because a party has a cause of action against his attorney, his opponent should hold a verdict obtained by a mistake, contrary to the merits.] In *Breach v. Casterton* (b), the Court refused to grant a new trial, even on payment of costs, where the cause had been, through the misconduct of the attorney's clerk, tried as undefended, though there was a good defence on the merits.

Knowles, in support of the rule. The rule should be made absolute, and without costs; for where a party has had the opportunity of re-trying the case, and has refused to do so, the Court will not give him costs; *Pope v. Fleming* (c). There the defendant moved for the costs of the day, in consequence of the plaintiff not having been prepared to try when the cause was called on; but the Court refused the application, as it appeared that the plaintiff had subsequently, on the same day, offered

(a) 1 C. B. 635.

(b) 7 Bing. 224; S. C. 4 M. & P. 867.

(c) *Ante*, p. 272.

to try. [*Pollock*, C. B.—That was not a motion to set aside a verdict which had been obtained regularly. *Parke*, B.—Here the plaintiff was regular in his proceedings, the defendant was irregular.]

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POLLOCK, C. B.—The rule must be absolute on payment of costs. It is always desirable that a question of costs should be decided on clear grounds, and should not depend upon appeals to the discretion of the Court, upon the peculiar circumstances of each case. Here the plaintiff was regular, and the defendant irregular; the latter must therefore pay the costs. In the case of *Pope v. Fleming*, the plaintiff was not called on to waive a verdict; but the defendant prevented the cause being tried by entering a *ne recipiatur*, and afterwards, when the plaintiff offered to try, refused to consent. I think this case comes within the general rule, that proceedings which are regular can only be set aside on payment of costs.

The rest of the Court concurred.

Rule absolute, on payment of costs.



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November 22.

REGINA, on the Prosecution of DIMSDALE,
v.
FOULKES and Others.

[*Bail Court. Coram Patteson, J.*]

Where an application was made to remove an indictment by certiorari into this Court by one of several defendants, the Court granted it upon his entering into recognizances to pay the costs, not only if he, but if either of the other defendants were convicted.

LUSH moved for a certiorari to remove an indictment for a conspiracy from the Central Criminal Court into this Court.

The motion was made on the behalf of Foulkes only, who had not obtained the consent of the other defendants.

Lush. The defendant is willing to enter into recognizances conditioned to pay costs, not only if he, but if either of the other defendants be convicted. There can be no difficulty in his so doing, and he cannot afterwards dispute his own recognizances.

PATTESON, J.—The Crown Officer tells me there is no precedent for such a course. However, I see no objection to it; and you may have the rule, upon entering into a recognizance to appear and plead, and to pay the costs if any one of the defendants be convicted.

Rule granted (*a*).

(*a*) A similar rule was granted in an indictment for felony, arising out of the same transactions.



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CRESWICK v. HARRISON.

November 22.

[In the Common Pleas.

Coram *Jervis, C. J., and Maule, J.*]

IN this case there were two rules.

One called on the plaintiff to shew cause why an award should not be set aside, on the ground that the arbitrator had not decided all the matters in difference referred to him.

The other rule called upon the defendant to shew cause why he should not pay the Sheffield and Rotherham Joint Stock Banking Company the sum of 8139*l.* 8*s.*, pursuant to the same award.

The following facts appeared upon the affidavits in support of the rule. The action was in assumpsit for money had and received; and was brought by the public officer of the Sheffield and Rotherham Banking Company against the late manager of the Bakewell branch of their bank. The defendant pleaded several pleas, among which was one of accord and satisfaction. After issue joined, the cause and all matters in difference were referred to arbitration by a Judge's order, which contained the usual provision authorizing the Court to remit the matters to the arbitrator for his reconsideration. The defendant, it appeared, ceased to be manager of the branch bank on the 3rd of April, 1848, on which day, upon an investigation of his accounts, it was found that he was indebted to the company in the sum of 2700*l.* On the same day he deposited with them the title deeds of some property at Tideswell, in Yorkshire, by way of equitable mortgage, accompanied by a memorandum, stating that the

making such orders, they will not exercise it except in cases where they attachment.

Where a cause and all matters in difference are referred, an award, reciting the order of reference, and purporting to be made "*de præmissis*," is final, although it does not in express terms notice a matter brought before the arbitrator.

Semble, that the 18th section of the 1 & 2 Vict. c. 110, has not given the Courts power to make orders in cases in which it was not their practice to make any before the passing of that act; but has only given to orders for paying money made in their ordinary practice, the effect of judgments.

But even if they have the power of would grant an

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deposit was to be a security for the payment of 2700*l.* and interest. At the foot of the memorandum were written the following words: "the above 2700*l.* to be accepted in full of all demands." The bank subsequently discovered that other sums were due to them from the defendant, but when these further demands were brought before the arbitrator, the defendant put in a plea of the Statute of Limitations; and one of the questions discussed pending the arbitration was, whether the statement at the foot of the memorandum was a bar to the whole demand of the plaintiffs, or only to the extent of 2700*l.* It was contended on behalf of the defendant, that even if that statement did not prove the plea of accord and satisfaction, he would be entitled to a cross action or to a remedy in equity upon it; and that that was a matter in difference to be determined by the arbitrator.

The latter made his award on the 28th of October, 1850, and thereby, after reciting that the cause and all matters in difference between the parties had been referred to him, and that he had taken upon himself the burden of the arbitration, proceeded as follows: "I, having heard, weighed and considered the several allegations, vouchers, and proofs brought before me in pursuance of the said reference, do make and publish this my award in writing of and concerning the said several premises so referred as aforesaid." The arbitrator then awarded that the defendant should pay to the company, on the 6th of November next, 8139*l.* 8*s.*, and that the same should be taken by them in full satisfaction of their claims and demands so referred to him as aforesaid. He then found for the plaintiff upon each issue in the cause; and awarded, that the title deeds relating to the property at Tideswell should be held by the company, as a security for the payment of the said sum of 2700*l.* and interest at 5*l.* per cent., parcel of the said 8139*l.* 8*s.*, down to the 6th of November; that the company should, on payment of that said sum of 2700*l.* and interest on the 6th of November, deliver up the title deeds to the

defendant; and that on payment of the residue of the said 8139*l.* 8*s.*, the company should execute to him a release of all claims, demands, &c.

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Cowling shewed cause against the first, and supported the second rule. As regards both the cause and the matters in difference, the defendant's defence was either the Statute of Limitations or the agreement of the 3rd of April, 1848. It is a mistake to say that the arbitrator has not disposed of the question, whether that agreement was an answer to the whole demand or only to the extent of 2700*l.*; for the award in directing that the title deeds of the Tideswell property should be held as a security for 2700*l.*, and should be delivered up on payment of that sum, shews sufficiently that the arbitrator considered and disposed of the defendant's right to a cross action or relief in equity. But further, the award, after reciting that all matters in difference had been referred as well as the cause, declares that it is made "of and concerning the said several premises so referred as aforesaid;" and that shews that the matter in question has been decided. It should seem, that even where there is no award of general releases, the silence of the award as to some of the matters submitted and brought before the arbitrator does not, per se, prevent it from being a sufficient exercise of the authority vested in him by the submission. An award is good, notwithstanding the arbitrator has not made a distinct adjudication on each or any of the several distinct matters submitted to him, provided it does not appear that he has excluded any; 1 *Wms. Saund.* 33 *a*, n. (*b*), 6th ed. In *Gray v. Gwennap* (*a*), all matters in difference between the parties in the cause had been referred to an arbitrator, and his award, which recited the order of reference and directed a verdict to be entered for the plaintiff, was held sufficient, although it did not state that it was made "of and concerning the premises." In

(*a*) 1 B. & A. 106.

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Craven v. Craven (a), where one of the questions before the Court was whether an award was final, *Gibbs*, C. J., after observing that the award recited that the arbitrator had considered all the evidence and papers touching the matters in difference, adds: "this, therefore, purporting to be an award concerning the matters in difference, is equivalent to an award on the premises, which, according to my recollection, must be taken to be final, as to all matters referred." *Hayllar v. Ellis* (b), *Wynne v. Edwards* (c), and *Dunn v. Warlters* (d), are authorities in support of the same view. The only case which is inconsistent with those decisions is *Gyde v. Boucher* (e); but that case does not appear to have been very fully argued, nor were any authorities cited. If necessary, however, it will be contended that that case is not law. [*Maule*, J.—Or only to be distinguished by an inconvenient subtlety from the other cases.] [*Cowling* also argued in support of the cross rule.]

Byles, Serjt., and *Miller*, Serjt., in support of the first rule, and against the second. It will not be contended that the award should be set aside; but only that it should be referred back to the arbitrator. The question appears to have been distinctly raised before the arbitrator, whether the words at the foot of the memorandum accompanying the deposit of title deeds, proved the plea of accord and satisfaction, or whether they were the ground of a cross action or bill in equity. The award is wholly silent on that question; and it has, therefore, failed to dispose of all matters in difference. It is said, that the words "of and concerning the said several premises so referred as afore-said" conclusively shew that the question has been disposed of; but it was expressly held in *Gyde v. Boucher* that

(a) 7 Taunt. 644, 5; S. C. 1 1 D. & L. 976.

Moore, 403.

(d) 9 M. & W. 293; S. C. 1

(b) 3 M. & P. 503; S. C. 6 Dowl. 626, N. S.

Bing. 225.

(e) 5 Dowl. 127.

(c) 12 M. & W. 708; S. C.

such words are insufficient. It is true, the cases upon this point are conflicting. It is necessary, therefore, under such circumstances, to resort to principle, and that is in favour of the defendant. In *Dunn v. Warlters* (a), where the award was "of and concerning the premises," Lord Abinger says: "If this matter had been *res integra*, I should certainly have been disposed to think that this award was void; but we are bound by the authorities which have been referred to, and cannot set it aside." It is observable, that the arbitrator has ordered that a release should be given to the defendant, but has not directed him to give one to the plaintiffs; and that circumstance is some evidence that the arbitrator did not decide the question as to the cross action.

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With respect to the cross rule, it is submitted that this is not a case in which the Court would grant an attachment against the defendant for disobedience to the award; and if so, they will not make an order to pay under the 1 & 2 Vict. c. 110, s. 18.

JERVIS, C. J.—I learn from the defendant's counsel that his application is in effect not to set aside the award, but to refer it back to the arbitrator; not, however, merely for the purpose of having any supposed defect rectified, but in order to have the whole matter re-opened. But I see no ground for that; for in my opinion, the arbitrator has decided all the matters in difference. The rule was obtained out of deference to the decision of my Brother Coleridge, in *Gyde v. Boucher*; but upon the motion for it my Brother Williams referred to the authorities in *Wms. Saund.* (b), and shewed that they were all on the other side. There is in fact no case in favour of the application, except that of *Gyde v. Boucher*. I do not understand Lord Abinger to say in *Dunn v. Warlters*, that he was com-

(a) 9 M. & W. 293, 296; S. C. 1 Dowl. 626, 630, N. S.

(b) Vol. 1, 33 a, n. (b), 6th ed.

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pelled by the authorities to decide that case against his own opinion; all that he meant to say was, merely that if the question had not been settled by authority, and he were required to look to principle, he should have taken time to consider the matter. The other Judges did not express any doubt upon the subject, but confirmed the former decisions. These are all one way; and they decide this, that upon a submission of a cause and all matters in difference, an award "of and concerning the premises referred" is sufficient. It is not necessary to refer more particularly to *Gyde v. Boucher* (a), except to say that it was cited in *Dunn v. Warlters* (b), and was not acted on. I therefore think that the rule for setting aside the award should be discharged.

I also think, however, that the rule to pay the money under the 1 & 2 Vict. c. 110, s. 18, ought not to be made absolute. The question is, what was the intention of the Legislature when it provided that orders should have the effect of judgments. I doubt much whether it was ever intended that the Court should make any order, where the party could in the ordinary course of practice have his remedy by judgment. An order like this to pay money under an award was never made until this statute was passed; and I do not think that it authorizes the making of any such order. I think the statute means this; that, wherever by the ordinary practice of the Courts an order was made for the payment of money, that order should have the effect of a judgment. At all events, I have sufficient doubt on my mind as to what is the effect of the statute to justify me in refusing to make this rule absolute.

MAULE, J.—I concur. The award is perfectly good, being made de præmissis; which was the case in *Dunn v. Warlters*, and the other authorities, without any special finding that the parties had no other matter in difference.

(a) 5 Dowl. 127.

(b) 9 M. & W. 293; S. C. 1 Dowl. 626, N. S.

That is in practice the construction put upon awards. With respect to this being at variance with principle, I should observe that what Lord *Abinger* said has been much exaggerated. He does not say "if it were not for the cases I would have decided otherwise," but only "were it not for the cases I would have considered the question;" and knowing well the great acuteness of Lord *Abinger*, I am satisfied that if he had considered it ever so much he would have come to the same conclusion as his learned predecessors did. No distinction has been suggested between that case and this. The whole current of authorities is one way, and the case before my Brother *Coleridge* the other. That case may, indeed, be distinguishable, but not on any substantial ground; and I cannot but think that it is contrary to previous decisions, and also to a subsequent case decided by the Court of Exchequer (*a*). At all events, when the alternative is to overrule that case or the whole current of authorities which conflict with it, there is no doubt which alternative to adopt. As to the rule to set aside the award, therefore, it must be discharged.

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As to the cross rule to pay the money under the award, I go a long way with what the Lord Chief Justice has said; indeed I expressed something to the same effect on a former occasion. What I conceive was meant by the statute was this: that—leaving the practice of the Courts as to orders as it stood before the act,—when an order was made, the person in whose favour it was made should have the further remedy of execution, in the same way as if it were a judgment. But I own that though that was my opinion, the Courts have acted otherwise, and have made orders which before the statute nobody ever heard of or asked for (*b*). They have said that the statute was a reason for

(*a*) *Dunn v. Warlters*, 9 M. & W. 293; S. C. 1 Dowl. 626, N. S. v. *Postlethwaite*, 1 Q. B. 243; S. C. 4 P. & D. 623; in the

(*b*) See in the Queen's Bench, Bail Court, *Doe d. Steer v. Bradley*, 1 Dowl. 259, N. S. *Jordan v. Williams*, 11 A. & E. 175; S. C. 4 P. & D. 217. *Neale v. Berwick*, 1 Dowl. 271, N. S.

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making such orders: but I think there should be some limit to the practice of making orders to enforce awards; and that when we would not grant an attachment, we ought not to make any order under the statute. When an attachment is applied for, if the validity of the award be doubtful, the Court does not grant it, but leaves the party to his action. But where on the other hand, a person is contumacious, and refuses to pay, then the Court does grant an attachment. This is not a case of that kind; and though I think there is nothing to shew that the award ought to be set aside, yet I cannot but think that the defendant has made this application *bonâ fide*, or at any rate, that he may have done so. And if so, I should be very unwilling to grant an attachment. It might be that we were wrong in thinking the award good; and if we were to grant an attachment, the defendant would be precluded from carrying our decision to a Court of error. That is a sufficient reason for not granting an attachment; and if we ought not to grant that, we ought not to make this order (*a*). The plaintiff must be put to his action to enforce the award (*b*).

Rules discharged.

Burton v. Mendizabel, 1 Dowl. 336, N. S. *Doe d. Moody v. Squire*, 2 Dowl. 327, N. S.; *Hawkins v. Benton*, 2 D. & L. 465; in the Common Pleas, *Smith v. Troup*, 7 C. B. 757; S. C. 6 D. & L. 679; and in the Exchequer, *Doe v. Amey*, 8 M. & W. 565;

S. C. 1 Dowl. 23, N. S.

(*a*) See *Spence v. Clarkson*, 1 Dowl. 837, N. S.; *Hawkins v. Benton*, 2 D. & L. 465.

(*b*) *Williams, J.*, and *Talfourd, J.*, were in the Exchequer Chamber, hearing criminal appeals.

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ROOM v. COTTAM.

November 22.

[In the Exchequer of Pleas.

Coram *Parke, B., Alderson, B., and Platt, B.*]

THIS was a rule to enter a suggestion to deprive the plaintiff of costs under the County Courts' Act, 9 & 10 Vict. c. 95, s. 129.

The affidavit upon which the rule was obtained stated, that "the plaintiff resided at Birmingham, that the action was brought for goods sold and delivered to the defendant at his present place of residence and place of business situate at West Bromwich, in the County of Stafford, and that the goods were delivered to the defendant at his said residence and place of business at," &c., "and within the jurisdiction of the County Court of Staffordshire at Olbury," also, "that at the time of the commencement of this action, the plaintiff did not dwell more than twenty miles from the defendant, but within twenty miles from the defendant, that is to say within seven miles."

An affidavit to enter a suggestion to deprive the plaintiff of costs, under the County Courts' Act, (9 & 10 Vict. c. 95, s. 129), which states, that the plaintiff, at the commencement of the action, did not dwell more than twenty miles "from the defendant," is bad, for not saying "from the defendant's residence."

Such an affidavit should follow the intention, and not the words, of the act (a).

Joyce shewed cause. There is a fatal objection to the affidavit. A party to bring himself within the statute 9 & 10 Vict. c. 95, s. 129, must shew that the plaintiff dwells within twenty miles from the defendant's residence ;

(a) By 13 & 14 Vict. c. 61, s. 11, it is unnecessary to enter a suggestion in order to deprive a plaintiff of costs. A suggestion is, however, still necessary under the City of London Small Debts' Act (10 & 11 Vict. c. lxxi. ss. 112, 113), and as under 13 & 14 Vict. c. 61, s. 13, a Judge at Chambers

may make an order for the plaintiff to have costs in cases of concurrent jurisdiction, or where the plaintiff could not sue in the County Court, the onus of proof is merely shifted, and the facts in opposition to an application for such an order must still be shewn on affidavit.

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here it is only stated that the plaintiff dwells within twenty miles "from the defendant," and the distance of Birmingham from West Bromwich is not shewn; so that the statement of their places of residence does not aid. A similar objection prevailed in *Johnson v. Ward* (a). In *Kirby v. Hickson* (b), it was held, that the affidavit must state that the residences of the plaintiff and defendant are within twenty miles of each other; and in *Duck v. Barton* (c), this Court adopted the same rule.

Lush, in support of the rule. The affidavit is sufficient within the decision of *Butler v. Corney* (d), where this Court held that it was sufficient to shew a *prima facie* case within the words of the act. [*Alderson*, B.—The affidavit should follow the meaning of the words, and not the words themselves.] The Court of Common Pleas held the same in *Hayter v. Fish* (e). [*Parke*, B.—I do not assent to *Hayter v. Fish*. The Court which decided that case, laid down a different and more correct rule in *Peterson v. Davis* (f).] There being a conflict of decisions the Court will not discharge the rule with costs, even if they think the affidavit insufficient.

PARKE, B. (g)—The affidavit in this case is insufficient, as it does not state what was the distance between the places of residence of the plaintiff and defendant. I think we should adhere to the later decisions, and that the case of *Kirby v. Hickson* contains the true rule. If we once depart from the strict rule and admit of equivalents, we may be called on to go farther in each case, until at last the statements will be such that the deponent could not be indicted for perjury upon the affidavit.

(a) 6 D. & L. 720.

(b) *Ante*, p. 364.

(c) *Ante*, p. 201.

(d) 6 D. & L. 45; S. C. 2 Exch.
474.

(e) 6 D. & L. 355; S. C. 6 C.

B. 568.

(f) 6 C. B. 235, 247; S. C. 6
D. & L. 79; and 7 D. & L. 109.

(g) *Pollock*, C. B., was presid-
ing in the Court of Criminal
Appeal.

ALDERSON, B.—I am of the same opinion, *Kirby v. Hickson* is supported by *Peterson v. Davis*, and *Duck v. Barton*. We ought never to be called on to decide as to the sufficiency of equivalents, when there is no difficulty in following the proper form.

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PLATT, B., concurred.

Rule discharged (a).

(a) With costs.

WILSON v. THE CALEDONIAN RAILWAY COMPANY.

November 22.

[In the Exchequer of Pleas.

Coram *Parke, B., Alderson, B., and Platt, B.*]

A RULE had been obtained, calling on the plaintiff to shew cause why the service of the writ of summons in this cause should not be set aside for irregularity.

The rule was obtained upon the affidavit of the secretary of the company, which stated that the action was in debt, and that the service of the summons had been effected upon him personally while attending a meeting of shareholders held in London. The affidavit also stated that the Caledonian Railway Company was established by 8 & 9 Vict. c. clxii. for the purpose of making a railway from Carlisle to Edinburgh and Glasgow; that the line was wholly in Scotland, except a portion consisting of six miles, which was in Cumberland; that the defendants had but one principal office, and that that was in Scotland; and that they

By the act incorporating the Caledonian Railway Company, six miles of which are in England, and the rest in Scotland, the English Companies' Clauses Consolidation Act (8 & 9 Vict. c. 16), is incorporated, so far as is necessary for carrying into effect the English portion of the line. The company's principal office was in Edin-

burgh, and their only office in England was at Carlisle, which was used only for receiving passengers and goods.

Held, that service of a writ of summons in an action of debt, on the secretary of the company while attending a meeting in London, was good.

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had no office in England except the station of the line at Carlisle, which was occupied jointly by the defendants and the Lancaster and Carlisle Railway Company for receiving goods and passengers, but not for transacting any of the general business of the company.

A similar application had already been made to *Jervis*, C. J., at Chambers, who dismissed the summons.

Willes shewed cause. The claim in the present action is not local; debts and contracts are nullius loci. The only question, therefore, is, whether the company has been duly served. Proceedings against corporations at common law were by distringas on their lands and goods. If they had neither, the only remedy was in Parliament; *Tidd's Pract.* p. 121, 9th ed. Now, however, by the Uniformity of Process Act (2 Wm. 4, c. 39, s. 13), writs of summons may be served on the secretary of a corporation. But, independently of that act, the service of the writ was regular. By the defendants' act of incorporation, 8 & 9 Vict. c. clxii. s. 2, after reciting, that "a portion of the railway and works hereinafter authorized to be made and maintained will be situate in that part of the United Kingdom called England;" it is enacted, that "so far as may be necessary for carrying into effect the object and purposes of this act, in relation to such portion of the said railway or works," the Companies' Clauses, the Lands' Clauses, and the Railway Clauses Consolidation Acts, 1845 (8 & 9 Vict. cc. 16, 18, 20), "shall apply to and form part of this act." And the 135th section of the first of those acts provides, that writs may be served by personal service on the principal officer of the company. If, therefore, the last mentioned act applies to the company, there has been good service under it; if not, the writ has been well served under 2 Wm. 4, c. 39. In *Evans v. The Dublin and Drogheda Railway Company* (a), it is true, where the service of a writ of summons was held insufficient,

(a) 14 M. & W. 142; S. C. 2 D. & L. 865.

it appeared that the service was not in compliance with the provisions of the company's act; besides, the company was altogether out of the jurisdiction. The present defendants, however, are clearly within the jurisdiction with respect to that portion of their line which is in England; and as the cause of action is transitory, they may be sued in this country; *Mostyn v. Fabrigas* (a). If the service might be good for some purposes, and bad for others, the Court would, upon a question as to the sufficiency of service, be called upon to try the cause itself upon affidavits.

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Rew, in support of the rule. The true criterion for determining whether the service of the writ was sufficient is this: is the company a Scottish or an English corporation? If it be Scottish, the service is bad, and the circumstance that part of the railway is in England does not affect the question of service. A foreign corporation is not brought within the jurisdiction of the English Courts merely by having property in this country. If the corporation of Dublin were to send an address to this country, an English Court could not seize their mace. [*Parke*, B.—I do not know that.] *Evans v. The Dublin and Drogheda Railway Company* (b), though it does not decide the point in this case, decides the principle contended for. In *Pilbrow v. Pilbrow's Atmospheric Railway, &c. Company* (c), it was held, that service upon a director at Barnet was not good service upon a company carrying on business in London. It may be, that for a cause of action (such as an injury caused by an accident) arising on the English portion of the line, service at the Carlisle station would suffice. [*Alderson*, B.—If a contract is made by them, are they not liable in either country?] Yes, if the contract be of a transitory nature, as a bill of exchange.

PARKE, B.—If the defendants are an English corpora-

(a) Cowp. 161.

2 D. & L. 865.

(b) 14 M. & W. 142; S. C.

(c) 3 C. B. 730; S. C. 4 D. & L. 450.

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tion, the service is good. I do not see how the defendants can be a corporation partly English and partly Scottish; but that difficulty does not arise, for the English Companies' Clauses Consolidation Act is incorporated in the defendants' act of incorporation: that gets rid of the difficulty, and the service is regular under that act.

ALDERSON, B., and PLATT, B., concurred.

Rule discharged.

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JOB v. BUTTERFIELD and Another.

[In the Exchequer of Pleas.

Coram Parke, B., Alderson, B., and Platt, B.]

One of several defendants may change the venue in an action upon the usual affidavit, unless from special circumstances manifest injustice would be done by that step.

Where, therefore, one of two defendants changed the venue on the usual affidavit, the Court refused, on the motion of the plaintiff to set aside the rule for that purpose, although the other defendant swore that he had not

given his consent, and that if he had been asked he would have refused to give it.

THIS was a rule obtained by the plaintiff calling upon the defendant Butterfield to shew cause why a rule (a) for changing the venue from Middlesex to Yorkshire, which had been obtained upon the usual affidavit, should not be set aside. The application was supported by the affidavit of the other defendant, which stated that a rule for changing the venue had been obtained upon the application and affidavit of the defendant Butterfield, without his assent; that his assent had never been asked; and that, had it been asked, he would have refused to give it.

Milward shewed cause. The general rule is, that one defendant is entitled to change the venue upon the ordinary

(a) Formerly, as this was only a rule nisi, any grounds in opposition could be used in shewing cause against it; it is now, how-

ever, absolute in the first instance, see Reg. Gen. Hil. Term, 2 Wm. 4, r. 103.

affidavit; *Box v. Read* (a); and unless there be some special circumstance in the present case, the Court will not depart from it. The only exceptions to that rule are cases in which some manifest injustice would arise if the other defendant did not join in the application. Thus, in *Eccles v. Holland and Others* (b), where the proceedings were commenced by original writ in London, the Court refused to change the venue to a county palatine on the application of three of the defendants, unless the fourth joined them in an undertaking not to assign the want of an original for error. The same terms were required in *Braddeley v. Rippon* (c), where *Gibbs, J.*, points out the reason, saying, "We cannot bind the other defendants." So, in *Groves v. Thackery* (d). These exceptions go to prove the rule. An anonymous case in *Chitty's Reports* (e) is opposed to those authorities, but no reasons are there given.

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R. B. Miller, in support of the rule. The practice laid down in 2 *Chit. Archb.* 1164, 5, 8th ed., as to the affidavit is this: "It may be made by one of several defendants. One of several defendants, however, cannot change the venue without the consent of the others; but if there be reason to infer their consent, it may be changed upon the application of one of them, though the others have, by pleading, obtaining time on terms, or even suffering judgment by default, lost their privilege." The reason is, that one defendant cannot be prejudiced by the act of his co-defendant. Here, the other defendant states that his assent was not asked, and that he would have refused to give it if asked. [*Parke, B.*—If there are any reasons why he would be injured by the course that has been taken, he should have stated them.]

PARKE, B.—The only question is, whether, where there

(a) *Barnes*, 482; *S. C. Pract. Reg. of C. P.* 430.

(b) 4 *M. & S.* 233.

(c) 5 *Taunt.* 87.

(d) *Id.* 631.

(e) 2 *Chit.* 417.

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is more than one defendant, it is competent for one to make an application to change the venue without the other defendants joining in it. The instances given in 2 *Chit. Archb.* 1164, 5, 8th ed. of his being allowed to do so, shew that the rule there laid down is wrong. The case of *Bar v. Read* (a) is an authority decided on the simple ground that no such consent is necessary, and the other cases cited decide that such consent is necessary only where, from special circumstances, manifest injustice would arise were it not obtained. The very distinction there taken shews that, where those circumstances do not exist, it is not needed.

PER CURIAM.

Rule discharged.

(a) Barnes, 482; S. C. Pract. Reg. of C. P. 430.

November 22.

BURN v. COOK.

[In the Exchequer of Pleas.

Coram Parke, B., Alderson, B., and Platt, B.]

A defendant cannot move for judgment as in case of nonsuit after a peremptory undertaking, until after the sittings in the Term in which the default is made, are concluded.

ASPLAND moved for a rule absolute, in the first instance for judgment as in case of nonsuit.

The affidavit in support of the rule stated that a previous rule for judgment as in case of a nonsuit had been discharged on a peremptory undertaking, to try at the sittings in Middlesex in this Term; and that no notice of trial had been given. The last sitting had been begun but was not finished when the motion was made.

Aspland. The motion may be made in the same Term as the default; *Ashton v. Johnstone* (a); and the affidavit

(a) 8 Dowl. 299. In that case the undertaking was to try at the first sittings in Term, and those

sittings were over when the motion was made.

which states that notice of trial has not been given is sufficient; *Woolmer v. Collins (a)*. The Court will not presume that a trial can now take place.

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PER CURIAM.—The motion is too early, as the cause may possibly still be entered by order of the Judge sitting at nisi prius; but the motion may be renewed on the last day of this Term, the affidavit being re-sworn.

Rule refused.

(a) 5 D. & L. 306.

Ex parte O'NEILL.

November 23.

[In the Common Pleas.

Coram *Jervis, C. J., Maule, J., Williams, J., and Talfourd, J.*]

SKINNER, on a former day in this Term, obtained a habeas corpus to bring up the body of one O'Neill, in order to be discharged from the custody of the governor of the House of Correction for Middlesex.

The return set out a warrant dated the 9th of October, 1850, under the seal of the Shoreditch County Court of Middlesex, which stated that a judgment had been recovered against the prisoner in the Shoreditch County Court, to pay a sum of money by certain instalments; that having made default in payment, he was summoned to appear on the 15th of April, 1850, before the Court, under the 98th section of the 9 & 10 Vict. c. 95; that he did not attend nor allege any reason for not attending; and that the Judge thereupon made an order dated on that day, ordering that the prisoner should be committed for fourteen days

It is no objection to a warrant upon an order of commitment made by a County Court Judge under the 98th section of the 9 & 10 Vict. c. 95, that the warrant was not issued until six months after the date of the order, although it does not appear that any previous warrant has been issued.

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for not attending. The prisoner was arrested on the 14th of November.

Upon the prisoner being brought up, and the return read,

Skinner moved that the prisoner be discharged. The warrant was issued too late. The 102nd section of the 9 & 10 Vict. c. 95, enacts, that when an order of commitment is made by the Judge, the clerk of the Court shall make out a warrant; and as no time is mentioned within which he is to make it out, it is his duty to do so within a reasonable time after the making of the order. The 105th section, which authorizes the Judge to suspend an order under certain circumstances, (*viz.*: when it appears to him that the defendant is unable from sickness or other sufficient cause, to pay the debt), shews that except under such circumstances even the Judge has no power to suspend it; and it is not probable that the Legislature intended to vest in the clerk of the Court a discretionary power which it withheld from the Court itself. But he will in effect have that power if the Court hold a warrant valid which he did not issue until six months after the date of the order. [*Williams, J.*—The 105th section, only means that the Judge may suspend an order against the wish of the plaintiff.] The 37th of the rules made by the Judges of the superior Courts, for the regulation of the practice of the County Courts under the 78th section, provides that no warrant shall be in force for more than two months; and if in this case a warrant had issued within a reasonable time it would have expired long before the prisoner was arrested. [*Maule, J.*—If, therefore, a debtor who dissipated away the property with which he ought to have paid his debts, chooses to be latitant and discurrent for two months, he would be safe?] The order of commitment is of a penal nature (*a*); and the inference to be collected

(*a*) See *Ex parte Kinning*, 4 C. B. 507; and *Abley v. Dale*, *ante*, p. 626.

from the 105th section and 37th rule is, that it was not intended that such an order should hang for any indefinite time over the head of the delinquent. But if the Court hold that it may hang over him for six months, they will find it difficult to say why it should not do so for six years, or for his whole life. [*Maule, J.*—How does it appear that the clerk did not issue a warrant immediately upon the order being made?] It does not affirmatively appear that any other warrant was ever issued; and if any had been it should have been recited in the present one, as a *ca. sa.* is recited in a *testatum ca. sa.* It must be borne in mind that the imprisonment does not in any way affect the prisoner's civil liability. It is a punishment for a violation of the law; and its infliction does not depend upon the payment of the debt. *Non constat* that it was not paid several months before the prisoner was arrested.

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JERVIS, C. J.—We desired to have the return in this case, because the point was one of some novelty and affected the liberty of the subject. But upon looking to the warrant we find it complies with the provisions of the act of Parliament. It states a judgment recovered for a sum of money; a judgment summons; and, for not appearing upon that, an order of imprisonment for fourteen days. Those fourteen days are to run from the date of the arrest. There is no rule to restrict the issuing of a warrant within a certain time from the making of the order. There is, indeed, a rule that the warrant shall not be current beyond two months; but it does not appear that other warrants were not issued; and several may in fact have been issued in consequence of the party keeping out of the way. Unless it can be shewn that such a warrant be contrary to the provisions of the act and the established practice, I see no reason for doubting its validity.

MAULE, J.—The defendant does not allege that he could have been taken earlier than he was, and it could not be

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the duty of the plaintiff to take a person who was not to be found. There ought perhaps to be some rule respecting orders similar to that referred to by Mr. *Skinner*; but as there is no such a rule, I think the proceeding is regular.

WILLIAMS, J.—I am of the same opinion. Mr. *Skinner's* argument shews that some provision ought, perhaps, to be made by the Legislature or by a rule of practice. But taking the act as it stands, as there is no rule of practice, I think the warrant regular.

TALFOURD, J., concurred,

Prisoner remanded.

November 23.

LARCHIN and Others v. BUCKLE.

[In the Common Pleas.

Coram *Jervis, C. J., Maule, J., Williams, J., and Talfourd, J.*]

Where one of several co-plaintiffs dies, the surviving plaintiffs must, if they desire to bring that fact to the knowledge of the Court in any proceeding in the cause, enter a suggestion of it upon the roll.

Where, therefore, the defendant obtained a rule for judgment as in case of a nonsuit, the Court refused to discharge it, except upon the usual peremptory undertaking to try; notwithstanding the production of an affidavit stating the death of one of the plaintiffs subsequently to the delivery of the declaration.

That affidavit was intituled in the names of all the plaintiffs, both deceased and surviving. *Seemle*, per *Maule, J.*, that it was wrongly intituled.

THIS was a rule for judgment as in case of a nonsuit. The action was commenced by three plaintiffs, and the affidavit upon which the rule was obtained contained the names of the three plaintiffs in its title.

Willes shewed cause upon an affidavit similarly intituled, which stated that one of the plaintiffs had died subsequently to the delivery of the declaration. This rule must be discharged, for it was obtained upon an affidavit intituled in a

non-existing cause, and if its contents were false, no perjury could be assigned upon it; *Rex v. Cohen* (a). [*Talfourd*, J. —Does not the same objection lie against the plaintiffs' affidavit?] At all events, judgment as in case of a nonsuit cannot be given; for a dead man cannot be nonsuited. [*Jervis*, C. J.—Why not?] The maxim, *contra non valentem agere nulla currit præscriptio*, would apply. Upon the death of one of several co-plaintiffs the action abates at common law, and is not revived until a suggestion of the death is entered upon the roll. The language of the 8 & 9 Wm. 3, c. 11, s. 7 (b), makes the entry of the suggestion a condition precedent to the action being revived. The case of *Barnewall v. Sutherland* (c), recently decided in this Court, shews that the cause cannot proceed until a suggestion be entered. As the cause is abated, the defendant cannot take any step in it in its present state. If he desired to have it tried by proviso, he would be obliged to take the preliminary step of calling upon the surviving plaintiffs to carry in the roll in order that a suggestion of the death might be entered; *Far v. Denn* (d); 1 *Chit. Stat.* 2, n. (e). [*Maule*, J.—It is clear that the plaintiffs have been guilty of a default. When one of their co-plaintiffs died, it was their duty to enter a suggestion of that fact upon the roll. They are now relying upon their own default.] At present there is no cause in Court, and the Court, therefore, can make no rule. The statute says that the cause is to proceed at the suit of the surviving plaintiffs; it must, therefore, be intitled in their names, and not in that of the original plaintiffs; and, consequently, it is no longer the same cause. [*Maule*, J.,

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(a) 1 Stark. 511.

(b) By which it is enacted, "that if there be two or more plaintiffs or defendants, and one or more of them should die, if the cause of such action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ

or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants."

(c) *Ante*, p. 159.

(d) 1 Burr. 362.

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referred to *Pinkus v. Sturch* (a). *Williams, J.*—The cause was begun in the names of three plaintiffs: on the death of one of them a suggestion is to be entered, and then the cause is to be continued by the survivors. It is, however, the same, and not a different cause.]

Phinn, in support of the rule. There is no evidence before the Court of the death of one of the plaintiffs; for the affidavit relied upon by the plaintiffs cannot be received. If one of the plaintiffs be dead, a suggestion of his death should be entered upon the roll; which is the proper mode of bringing that fact to the knowledge of the Court. Even if an affidavit be admissible for that purpose, the present one cannot be read, for the very statement which it contains of the plaintiff's death shews that it is wrongly intitled.

JERVIS, C. J.—In this case the rule must be discharged; but only upon a peremptory undertaking to try. At the time when the application was made, there had been a default, and the record was perfect. It shewed that the default might be taken advantage of; and that distinguishes the present case from *Pinkus v. Sturch*. In that case there were four defendants, and two had not pleaded. It was necessary, therefore, upon an application similar to the present one, to account to the Court for the imperfection which appeared upon the face of the record; and the only way of doing that was by entering a suggestion; for that is the only mode by which the matter can be regularly disputed. A party cannot allege such a matter by affidavit merely. If the plaintiffs, after giving a peremptory undertaking, want to proceed, they must suggest the death of their co-plaintiff on the record, and the matter can then be disputed. Without that, the Court is not properly informed of the death of the party so as to sustain the present objection.

(a) 5 C. B. 474: S. C. 5 D. & L. 515.

MAULE, J.—The principle of the case of *Pinkus v. Sturch*, applies in this case. That was an action against four defendants, and issue was joined as to two of them, but not as to the other two; and when Mr. *Crompton* moved for judgment as in case of a nonsuit, the objection was taken that he could not do so in the then state of the record. The answer was that two of the defendants were dead; but the Court said, if so, you ought to enter a suggestion, in order that we may see that issue has been properly joined; but we cannot have the facts stated upon affidavit merely. The Court will not allow a person to avail himself of the death of a party to the cause, without entering a suggestion. Here the plaintiff seeks to avail himself of the fact of his co-plaintiff being dead, in order to discharge the rule for judgment as in case of a nonsuit; there the defendant sought to allege, on affidavit, the death of both defendants in order to obtain his rule. But the principle is the same in both cases; and the circumstance that the death was relied upon in the one case in support, and in the other, in opposition to the application, does not vary the principle on which the Court proceeded. If the plaintiffs think fit to say that their co-plaintiff is dead, they must enter a suggestion to that effect. As to their affidavit, which states that fact, it is not properly intituled, and, therefore, for aught that the Court can see, the plaintiff may be dead, or he may not. If a suggestion were entered, the question might be raised and tried by a jury; or it might be raised upon affidavits on a rule to shew cause why a suggestion should not be entered. In short, there would then be some way of trying the question; here there is none. The technical grounds of our decision in this case agree with the merits. And so it often happens; since technical rules are made for the advancement of justice. I, therefore, agree that this rule ought not to be discharged, except upon a peremptory undertaking.

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WILLIAMS, J.—I am very glad, for the reasons assigned

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by the Lord Chief Justice and my Brother *Maule*, that I am enabled to escape from the injustice which would arise from adopting Mr. *Willes*' argument.

TALFOURD, J., concurred.

Rule accordingly.

November 23.

TURNER v. BARRY.

[In the Exchequer of Pleas.

Coram *Pollock, C. B., Parke, B., Alderson, B., and Platt, B.*]

Where a debt or demand exceeding 20*l.* is sued for in a superior Court, and is reduced below that sum by payments, the defendant is entitled to enter a suggestion to deprive the plaintiff of costs, under the County Courts' Act, 9 & 10 Vict. c. 95, s. 129.

A RULE had been obtained to enter a suggestion to deprive the plaintiff of costs under the County Courts' Act, 9 & 10 Vict. c. 95, s. 129.

It appeared upon the affidavits that the action was in debt for 46*l.*; that the defendant pleaded, inter alia, payment, and at the trial partially succeeded on that issue, and reduced the plaintiff's claim to 16*l.* 9*s.* 1*d.*, for which sum a verdict was entered. The affidavit shewed that the cause of action arose within the jurisdiction of a County Court, and negatived the exceptions of the 128th section.

Griffiths shewed cause. The question is whether, when a plaintiff sues for more than 20*l.*, but the defendant at the trial reduces the claim to a sum below that amount by proving payments, the plaintiff can be deprived of costs under the 129th section of the County Courts' Act, 9 & 10 Vict. c. 95. That section enacts, that if an action is commenced in a superior Court, for any cause "for which a plaint might have been entered in" the County Court, if the verdict is for a sum under 20*l.* in an action of contract, the

plaintiff shall recover no costs; so that the test by which this question is to be tried is, whether the plaintiff could have entered a plaint in the County Court. But he could not have done that without waiving a portion of his demand. The jurisdiction of that Court is, by sect. 58, limited to actions where "the debt or damage claimed is not more than 20*l*., whether on balance of account or otherwise." The present claim was more than 20*l*. In *Harsant v. Larkin* (*a*), which was decided upon the Rochester Court of Requests' Acts, 22 Geo. 3, c. 27, and 48 Geo. 3, c. 51, the Court held that where the original sum was reduced by payment, so that the verdict in the superior Court was for an amount under 5*l*.,—the extent of claim over which the inferior Court had jurisdiction,—the defendant was not entitled to a suggestion. [*Pollock*, C. B.—That case was decided upon the particular provisions of those acts. By sect. 13 of the latter act, the Rochester Court had no jurisdiction where the sum claimed was "the balance of an account or demand originally exceeding 5*l*." *Parke*, B.—The distinction in the decisions on the old Court of Requests' Acts has generally been between cases where the plaintiff's claim was reduced by set-off, and those in which it was reduced by payment.] In putting a construction on the words "balance of account or otherwise," the intention of the act must be borne in view. Had the Judge of a County Court adjudicated on this claim, he must have entertained a question relating to a larger sum than 20*l*.; since he must have tried first the plaintiff's claim to the extent of 46*l*., and then the defendant's payments. [*Pollock*, C. B.—According to your argument, if there had once been a debt of 100*l*., and the debtor had made nine payments of 10*l*. each, the creditor might sue for the remaining 10*l*. in a superior Court.] That would be so; unless a balance had been struck between the parties so as to reduce the plaintiff's claim to 10*l*. In the present case, the

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(*a*) 7 Moore, 68; S. C. 3 B. & B. 257.

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plaintiff was obliged to prove a claim to a larger amount than 20*l*.; that forms the true criterion whether the case is within the jurisdiction of the County Court. In *Woodhams v. Newman* (a), it was held that where a debt, originally exceeding 20*l*., was reduced by a set-off below that sum, the defendant was not entitled to enter a suggestion. In *McCollam v. Carr* (b), where a debt above 40*s*. was reduced by payments to an amount within that sum; on a motion for a suggestion *Eyre*, C. J., said, "Is there any case where the ultimate balance of an account only being under 40*s*. the Court has allowed a suggestion? I should pause upon such a case, since the most intricate point in accounts between merchant and merchant might by this means come to be decided before a County Court. It seems to me that the original demand ought to be under 40*s*." [*Alderson*, B.—Is not the true test, what is the debt? What, then, would have been recoverable by the plaintiff upon an issue joined on the old plea of nil debet? Would it not have been the sum of 16*l*. 9*s*. 1*d*.? *Parke*, R.—The real debt due was the amount which remained after deducting the sum paid. The meaning of "balance of account" was explained by *Maule*, J., in *Woodhams v. Newman*: "Those words, I conceive," he says, "mean this—suppose a claim to be preferred in the County Court for a sum below 20*l*., and it appears that the debt originally exceeded 20*l*., but has been reduced by payment or otherwise before action brought, the defendant shall not be entitled to say that the case is without the jurisdiction of the County Court, because the debt originally exceeded 20*l*." (c). The distinction in this respect between payment and set-off is also shewn by my Brother *Coltman* in the same case.]

(a) 6 D. & L. 683; S. C. 7 C. B. 654. See also *Beswick v. Capper*, 7 C. B. 669.

(b) 1 B. & P. 223. See, however, Lord *Ellenborough's* obser-

vations on this case in *Clark v. Askew*, 8 East, 28, 30. See also *Bateman v. Smith*, 14 East, 301.

(c) 7 C. B. 667.

O'Malley, in support of the rule, was not called on.

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POLLOCK, C. B.—I think that in this case the County Court clearly would have had jurisdiction. Even where an account has been stated between the parties, it may become necessary to go into the whole account to see that it has not been falsified or surcharged by either party. “Balance of account” must mean “balance of account on investigation.”

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PARKE, B.—I am of the same opinion. The County Court must at times go into amounts above 20*l*. Suppose a plaintiff sues on a promissory note for 20*l*., and the defendant at the trial proves that he has paid the plaintiff 1000*l*., it must be competent for the plaintiff, in answer, to shew that that sum was paid on an old account.

ALDERSON, B., and PLATT, B., concurred.

Rule absolute.

FAZAKERLEY v. ROGERSON.

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[*Bail Court. Coram Patteson, J.*]

THIS was a rule to shew cause why the Master should not review his taxation of the defendant's costs.

The following facts appeared upon the affidavits. The declaration was in case, and contained three counts. The first alleged that the defendant was tenant to the plaintiff of

The plaintiff succeeded at the trial on a single issue, which entitled him to a verdict, with nominal damages. The defendant succeeded on

all the other issues. On taxation of costs, the Master allowed the defendant the costs of the special jury obtained by the plaintiff, on the ground that the plaintiff could not have obtained a special jury if the issue on which he succeeded had been the only one to be tried; and the fees paid to counsel with the briefs, on the ground that they were moderate, and such as would have been allowed, if the issue on which the plaintiff had succeeded had not been to be tried. The Court refused to order the Master to review his taxation.

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a certain farm, and assigned five breaches of different customs of the country of cultivating farms, the fifth breach being for having more land in tillage in one year than he ought to have had. The second count was for waste, for converting an ancient meadow and pasture into tillage; and the third count was in trover for wheat and oats. The defendant pleaded not guilty to the whole declaration; traversed the customs alleged in the first, second, third, and fourth breaches in the first count; and pleaded, to the second count, that the meadow was not an ancient meadow, and to the third count, not possessed. The plaintiff obtained a special jury. At the trial, which took place at the last Spring Assizes at Liverpool, the jury found for the plaintiff, with 1*s.* damages upon the issue on the fifth breach in the first count; and for the defendant on all the other issues. On the taxation of costs, the Master allowed the defendant the costs of the special jury, and the whole of the fees which he had paid with briefs to counsel (*a*). The latter were allowed, on the ground that the briefs related almost entirely to the issues on which the defendant succeeded, and that the fees were such as would have been allowed if they had been the only issues to be tried. The costs of the special jury were allowed, on the ground that the defendant succeeded on all the issues on which a special jury could have been obtained.

H. Hill shewed cause. It will scarcely be contended that the Master was not justified in allowing some part, at least, of the fees with the briefs to counsel; if so, the objection is pointed at the exercise of the Master's discretion, with which the Court will not interfere. It is only when the Master proceeds on a wrong principle in his taxation, that the Court interposes to review it. Here it appears that the fees given were on so moderate a scale,

(*a*) Other items were objected to, but they turned out on inquiry to be perfectly correct.

that had there been no other issues in the action than those on which the defendant succeeded, the Master would have allowed the same amount. As regards the costs of the special jury, the defendant having succeeded on the only issues on which a special jury was obtainable, was entitled to them, as he was to any other class of costs exclusively applicable to the issues on which he succeeded.

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Atherton, in support of the rule. Although the plaintiff recovered only 1s. damages, and therefore, under Lord *Denman's* Act was not entitled to the general costs of the cause, the defendant is not thereby placed in a more favorable position; and his right to costs is the same as if the plaintiff had recovered substantial damages, in which case the defendant is only entitled to such costs as are exclusively applicable to the issues on which he has succeeded. Here, some part of the costs, both of the special jury and of the counsel's fees, must have been applicable also to the issues on which the plaintiff succeeded.

Cur. adv. vult.

PATTESON, J.—The only doubt that I entertained was, as to the Master having allowed the whole of the fees paid by the defendant on the briefs to counsel, and the costs of the special jury; but I find that where a plaintiff succeeds on a very small part of the whole cause of action and the defendant on the far larger part, the practice is to consider the defendant as entitled to such portion of the costs applicable to the issues on which he has succeeded, as would have been allowed to him, if they had been the only issues in the action.

The rule as laid down in the argument is clear, and I fully assent to it, that where the defendant succeeds on part of the issues, but the plaintiff obtains a verdict, the defendant is entitled only to such costs as are exclusively applicable to the issues on which he succeeds; and that, although the

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plaintiff may not be entitled to the general costs of the cause, having recovered only 1s. damages, the question as regards what costs are to be allowed to the defendant, must be considered as if the plaintiff had obtained substantial damages.

The question then comes to this, is it possible to divide the amount of counsel's fees, and the like, where the defendant succeeds on so large a part of the case? It is obviously very difficult to say that the defendant is to be allowed a certain amount for fees to counsel if the fees paid be large, and yet that the same amount is not to be allowed if it happens that they are the whole fees paid. I think that it must be left to the Master to exercise the discretion which is undoubtedly vested in him, of fixing the amount of fees proper to be allowed; and as I do not see any ground for holding that in the present instance, he has wrongly exercised this discretion, the rule must be discharged, and as is usual in such cases, must be discharged with costs.

Rule discharged accordingly.

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AYLWARD v. GARRETT.

[In the Common Pleas.

Coram Jervis, C. J., Williams, J., and Talfourd, J.]

Upon an issue of nul tiel record, the Court refused to give judgment, where the dies datus clause was omitted from the record.

DEBT upon a judgment for 24*l.* 5*s.* 6*d.* recovered in this Court.

Plea, nul tiel record.

Replication, that there is a record, &c. "And this the plaintiff is ready to verify by the said record, where and in such manner as the Court shall order, direct, and appoint. And he prays that the said record may be seen and inspected by the Court now here."

Bramwell moved for judgment.

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Master *Cancellor* stated, that the record in the former action was in Court, but objected that no day was named on the present record for hearing judgment (a).

Bramwell. The “dies datus” clause is no part of the pleadings. The replication concludes with the prayer of inspection; and the words which follow in the common form—viz., “but because,” &c. “a day is therefore given”—is the statement of the Court, and not of the plaintiff. It is, in fact, a continuance; and has, therefore, been properly omitted, as continuances have been abolished by Reg. Gen. Hil. Term, 4 Wm. 4, II., r. 2 (b). [*Jervis*, C. J.—Suppose an action for goods sold and delivered; plea, judgment recovered; replication, nul tiel record: would not the plaintiff be entitled to require that the defendant should name a day for bringing in the record?] That is admitted; but there is no necessity for making an entry to that effect upon the record. [*Jervis*, C. J.—If the pleadings were ore tenus, the matter would stand thus: the plaintiff would say he had recovered a judgment; the defendant would answer, No, you did not; upon which the Court would say, Bring the record into Court on Monday next. Whose duty is it to put that upon the record?] It is not the duty of any one, as continuances have been abolished. [*Jervis*, C. J., referred to 1 *Wms. Saund.* 92, n. (3). *Williams*, J.—The dies datus clause is not a continuance.] The omission, at all events, is merely an irregularity, into which the Court cannot now inquire. Like the omission to give a notice of trial, it may be the subject of a motion hereafter

(a) The plaintiff had duly obtained and served a rule for judgment.

(b) That rule provides, that “no entry of continuances by way of imparlance, curia advisari vult,

vicecomes non misit breve, or otherwise, shall be made upon any record or roll whatever, or in the pleadings, except the urata ponitur in respectu, which is to be retained.”

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if the defendant should be aggrieved thereby; but it is submitted that the cause is now regularly before the Court for trial; and they can no more inquire whether notice of the trial has been given to the defendant, than a Judge at nisi prius can enter upon the question whether the notice of trial was regularly given in any cause before him.

JERVIS, C. J.—The Court are of opinion that they cannot give judgment upon this record in its present form. The practice is laid down in Mr. *Chitty's* edition of *Archbold's Practice* (a) as follows: “On a record of the same Court being pleaded, when the plaintiff replies nul tiel record, or when he replies to a plea of nul tiel record, he concludes his replication that the record may be inspected; and a day in Court is accordingly given to the parties for that purpose. As this completes the pleadings, you may make up the issue and deliver it as in ordinary cases.” We think we are bound by the practice as there stated; and that such is a correct account of the practice is clear from a manuscript case which has been handed us by the Master (b), and which occurred since the making of the rule for abolishing continuances. There it was incumbent on the defendant to produce the record, and the Court made an order that the day for its production should be continued to a future day. This is a mere experiment, in contradiction of the authorities upon the point.

Judgment refused.

(a) Page 838, 8th ed.

(b) The following is a copy of the case referred to. It is taken from a MS. book of Mr. Tootell, of the Common Pleas Rule Office.

“Upon reading the record of the issues of nul tiel record in this cause and the affidavit of J. L., and on hearing counsel on behalf of the plaintiff, it is ordered, that the day for the production

by the defendant of the record of the writ on the said issue mentioned, be continued to Monday, the 31st of January inst.; and that the record of the said issue be amended accordingly.

“The affidavit to ground this application stated a summons pending to set aside the issue, as a reason for the non-production on the day first given.”

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COLEMAN v. FOSTER.

November 25.

[In the Common Pleas.]

Coram *Jervis, C. J., Williams, J., and Talfourd, J.*

THIS was a rule calling upon the defendant to shew cause why the declaration should not be amended by changing the venue from Surrey to Middlesex, the plaintiff undertaking to give material evidence in the latter county.

The following facts appeared upon the affidavit in support of the rule. The action was brought to recover 260*l.* for goods sold and delivered, and work done, at the house of the defendant situate at Reigate, Surrey. The venue was laid in London, under the belief that the plaintiff could give material evidence there, and had been changed by the defendant to Surrey upon the common affidavit. The plaintiff carried on business as an upholsterer in Curzon Street, Middlesex, and Bouverie Street, in the City of London. The defendant resided at Worthing, Sussex. The plaintiff's witnesses resided in Middlesex and London; and the affidavit stated that it would be inconvenient to take them to Surrey for the trial. The order for the goods had been given chiefly in Curzon Street. The material evidence which the plaintiff believed he could give in London was, that of payments in the office of the Law Life Assurance Society in Fleet Street; but he had discovered, since the delivery of the declaration, that part of that office was situated in London and part in Middlesex, and that, therefore, he could not safely give the necessary undertaking in order to bring back the venue to the place where it had been originally laid. He was ready, however, to undertake to give material evidence in Middlesex. The present rule was obtained before the defendant had pleaded.

The plaintiff laid the venue in London, believing that he could give material evidence there. The defendant having changed it to the county where the cause of action arose, the Court allowed the plaintiff, before plea pleaded, to amend the declaration, by changing the venue to a county in which the plaintiff could undertake to give material evidence.

The venue, as thus amended, is regarded as the original venue, *quoad* the defendant's right to change it upon the common affidavit.

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Willes shewed cause. As this is not an application to bring back the venue, but to change it to a different place, it is incumbent upon the plaintiff to shew some reason for the interference of the Court. And it has not done; for he merely states that he originally laid the venue in a place to which he is unable to bring it, and that it would be inconvenient to him to take witnesses to the county where the venue is now laid. If he was at liberty to lay the venue where he pleased in the first instance; and his failure to lay it in the place which was most advantageous to him, gives him no claim to the assistance of the Court. The application, besides, has been made too soon; for until the defendant has pleaded, we cannot tell whether any of the witnesses whose attendance in Surrey is alleged to be inconvenient, will be required at the trial.

Couch, in support of the rule. The ground of the present application is, not that circumstances have arisen since declaring which make a change of venue expedient, but that the venue was originally laid in London by mistake. In such a case the Court will interpose and enable the plaintiff to rectify his mistake. And it is unnecessary to wait until plea pleaded. In *Rivet v. Cholmondley* (a) the Court suffered the plaintiff to amend the venue after the defendant had changed it upon the common affidavit. 2 *Chit. Archb.* p. 1172, (8th ed.), after stating that the plaintiff may change the venue upon stating to the Court or Judge, any reasonable ground for the application, said; "and this even after plea pleaded and issue joined." The inference from that passage is, that if the venue may be changed after plea pleaded, a fortiori may it be changed before.

JERVIS, C. J.—My Brother *Maule* stated, when

(a) 2 *Stra.* 1202.

rule was granted, that he has frequently made similar orders at Chambers; and I think that it should be made absolute. The plaintiff has an absolute control over the venue, subject to the defendant's right to change it upon the common affidavit. If the plaintiff makes a mistake in laying it in a wrong place, I think he should be allowed to correct it. The venue as changed, however, is subject to the rule that the defendant may change it to the county where the cause of action arose; it is, in fact, just the same as if it were the original venue. The rule must be made absolute, but it must be on payment of costs.

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PER CURIAM.

Rule accordingly.

CALLANDER v. HOWARD.

November 25.

[In the Common Pleas.

Coram *Jervis, C. J., Williams, J., and Talfourd, J.*]

ASSUMPSIT. The declaration contained five counts; the first three of which were upon bills of exchange drawn upon and accepted by the defendant; the fourth for goods sold and delivered, money paid, and interest; and the last upon an account stated.

The defendant pleaded sixteen pleas: four of which were to the first count, four to the second, three to the third, one to the last two counts, and four to the whole declaration. Upon all the pleas, except the fifteenth, issues of fact were taken; and these were tried at the

Where a plaintiff succeeds upon all the issues of fact, but fails upon a demurrer going to the whole cause of action, he is entitled, under the 4 Ann. c. 16, s. 5, to the costs of the issues of fact.

The declaration contained five counts, to

which the defendant pleaded sixteen pleas. To one of these, which was to the whole declaration, the plaintiff demurred, and judgment was given against him. Upon the other fifteen pleas issue was joined, and a verdict was found for the plaintiff upon all the issues. *Held*, that the plaintiff was entitled, under the Statute of Anne, to the costs of those issues.

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sittings in London, after Michaelmas Term, 184 were all found for the plaintiff. To the fifteenth which was pleaded to the whole declaration, the p demurred; the demurrer was argued in Trinity Ter and the Court in the sittings in banco after that Ter judgment for the defendant (a).

Upon the taxation of costs, the plaintiff claimed th of the fifteen issues which had been found for him. Master, however, refused to allow him any costs, and a the defendant the general costs of the cause, ex of his costs of the issues of fact.

Willes, on a former day in this Term, obtained calling upon the defendant to shew cause why the l should not review his taxation.

Gray shewed cause. The question is, whether plaintiff, having failed upon the demurrer, is entit the costs of the issues of fact, upon all of which l succeeded. The authorities, both old and recent, the point, are conflicting. In *Yates v. Gun* (b), the l point of date, there was a demurrer and an issue of fac this Court held, that the plaintiff, failing upon the dem was yet entitled to the costs of the issue. In *Co Sayer* (c), which was decided a few years later, the of Queen's Bench refused, under similar circumstan allow the plaintiff the costs of the issue of fact. In *L Higginson* (d), both those cases, as well as many othe so immediately bearing upon the question, were rev by the Court of Queen's Bench, who came to the clusion that *Cooke v. Sayer* was not a satisfactory dec and adopted the ruling in *Yates v. Gun*. The however, finally came before the Exchequer in *Partn*

(a) See *ante*, p. 562.

(b) Barnes, 141.

(c) 2 Burr. 753; S. C. 2 Wils. 8.

(d) 5 A. & E. 63; S. C. 6 N. & 1

Gardner (a); and *Howell v. Rodbard* (b); and that Court felt themselves bound to overrule *Bird v. Higginson*. The ground of their decision is, that the plaintiff's right to recover costs can be derived only from the Statute of Gloucester, (6 Edw. 1, c. 1), or the 4 Ann. c. 16; but that he is not entitled to them under the former, as he has not recovered damages, nor under the latter, as it provides, not for the case of a plaintiff succeeding upon *all* the issues in fact, but only for the event of his succeeding upon *some* of such issues. [*Williams, J.*—Is it not strange that a plaintiff should be in a better condition if he succeeds partially than if he succeeds entirely? *Jervis, C. J.*—The case of *Clarke v. Allatt* (c), which was decided in this Court, was not cited in the Exchequer. That Court, also, does not appear to have adverted to the terms of the Statute of Anne.] The Court of Exchequer, in *Partridge v. Gardner*, and *Howell v. Rodbard*, relied chiefly on a class of cases of which *Richmond v. Johnson* (d) is the principal. There, all the issues were issues of fact, and they were all found for the plaintiff. The Judge, however, having certified under the stat. 43 Eliz. c. 6, to deprive him of costs, the question arose whether he was not entitled to them under the Statute of Anne. Lord *Ellenborough* said, "That statute" (the Statute of Anne) "meant to give an advantage to a defendant of pleading several matters; though in so doing it provided that such privilege should not be exercised vexatiously to the plaintiff: therefore it says that if any *issue* shall be found for the plaintiff, he shall have costs, &c. unless, &c. by which I understand, that if any one or more of several issues be found for the plaintiff, the rest being found for the defendant, the plaintiff shall have his costs of those pleas found for him, unless the Judge shall certify, &c. This was to check a superfluity of pleading; and was necessary to be introduced

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(a) 4 Exch. 303; S. C. 7 D.
& L. 106.

(b) Id. 309; S. C. *ante*, p. 547.

(c) 4 C. B. 335.

(d) 7 East, 583, 6.

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where any one bar was found for the defendant, which would give him the general costs of the cause, except for this provision: but where all the issues were found for the plaintiff, he did not want any new provision to give him the costs of the pleadings. And this shews that the Statute of Anne was not meant to apply to such a case." It certainly appears hard, that if a plaintiff fails upon one of sixteen issues, and succeeds upon the rest, he should have the costs of these, but that if he does not fail upon any, he should not be entitled to any costs; but that is the effect of *Richmond v. Johnson* (a). The question, after all, turns upon the construction of the statute of 4 Ann. c. 16, s. 5 (b). The words "if a verdict shall be found upon any issue" must apply only to issues of fact; for an issue in law has, in the earlier part of the section, been termed "a demurrer;" and as the plaintiff has not got a verdict "upon any issue,"—that is, upon any one or more of several issues of fact,—costs cannot be given to him. [*Jervis*, C. J.—The word "verdict" is satisfied by understanding it as the verdict of a jury upon an issue of fact, and as the judgment of the Court upon a demurrer.] The language of the act is, perhaps, not very clear; but the employment of the word "demurrer," when an issue of law is intended, shews that "verdict" means the finding upon an issue of fact. [*Williams*, J.—What do you understand by the word "costs?"] The costs of the issue. [*Williams*, J.—Then why not ascertain what issues have been found for the plaintiff and what for the defendant, and give the costs upon each?

(a) 7 East, 583.

(b) The 4th section enables a defendant, with the leave of the Court, to plead several matters; and the fifth provides, "that if such matter shall, upon demurrer joined, be judged insufficient, the costs shall be given at the discretion of the Court; or if a verdict shall be found upon any issue

in the said cause for the plaintiff or demandant, costs shall also be given in like manner, unless the Judge who tried the said issue shall certify that the defendant, or tenant, or plaintiff in replevin, had probable cause to plead such matter which, upon the said issue, shall be found against him."

Thus, if the plaintiff succeeds upon the first issue, he is entitled to the costs of it; so, if he succeeds upon the second; and so on. If he succeeds upon all, he is entitled to the costs of all.] *Richmond v. Johnson* shews that, in that case, he is not entitled to any, under the Statute of Anne. [*Williams, J.*—That statute applies only to cases where the defendant obtains judgment upon the whole record; where, therefore, but for the Statute of Anne, the plaintiff would not be entitled to costs. If that be its true construction, this case and *Bird v. Higginson* (a) are altogether distinguishable from *Richmond v. Johnson*, and *Hart v. Cutbush* (b); because, when the plaintiff is entitled to judgment upon the whole record, he is entitled to his costs without the Statute of Anne.] If the matter were *res integra*, the view suggested by the Court might, perhaps, be the most reasonable; but the question has been settled by authority.

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Willes in support of the rule. Whatever may be the conflict of authorities in the other Courts, the decisions in this Court are consistent, and are in favour of the plaintiff. The Court of Queen's Bench, in *Bird v. Higginson*, adopted the decision of the Common Pleas in *Yates v. Gun* (c), although in doing so, they overruled *Cooke v. Sayer* (d), a case in their Court. If the question, therefore, is to be determined by authority, and without reference to principle, it must be decided in the plaintiff's favour. Again, if the authorities are weighed and not counted, they will be found equally to support this rule. "If the decisions," says *Best, C. J.* (e), "are contradictory, we are to consider the reasons given for them by those who pronounced them. If our predecessors have given no reasons for their judgment, or the reasons given for conflicting judgments are equally

(a) 5 A. & E. 83; S. C. 6 N. & M. 799.

(b) 2 Dowl. 456.

(c) Barnes, 141.

(d) 2 Burr. 753; S. C. 2 Wils. 85.

(e) In *Newton v. Cowie*, 4 Bing. 234, 241.

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unsatisfactory, we are to put that construction on the statutes which our own unfettered judgment induces us to think the Legislature intended should be put on them." This principle of construction is to some extent applicable in the present case. The reason for the judgment in *Partridge v. Gardner* (a), and *Howell v. Rodbard* (b), is, that *Richmond v. Johnson* (c), had put upon the statute of Anne a certain construction which had been departed from in *Bird v. Higginson* (d); but if that ground fails, the authority of those cases cannot be successfully maintained. In *Richmond v. Johnson*, there was no issue in law, but all were issues of fact; it was therefore unnecessary for the Court to say whether their judgment would have been different if there had been a demurrer on the record. The language of the Court in that case must be understood secundum subjectam materiem; and was never intended to apply to a case like the present. If the rule laid down by the Court of Exchequer be adopted, and it be necessary that a plaintiff, in order to get costs under the statute of Anne, shall fail upon an issue of fact, it will follow, that if there had been fifteen demurrers and one issue in this case, and the defendant had succeeded upon the latter only, the plaintiff would be entitled to the costs of the fifteen demurrers, even though he has now no right to those of the fifteen issues. Or, suppose that there had been one more issue, upon a plea traversing some immaterial averment, and the defendant had succeeded upon it, the plaintiff would have been entitled to his costs according to *Partridge v. Gardner*. Even if the literal meaning of the words of the statute were in favour of the view there adopted, the Court would struggle against a construction leading to such absurd consequences. But the statute, which was not referred to in the cases in the Exchequer, supports the view now contended for.

(a) 4 Exch. 303; S. C. 7 D.
& L 106.

(b) Id. 309; S. C. ante, p. 547.

(c) 7 East, 583.

(d) 5 A. & E. 83; S. C. 6 N. &
M. 799.

JERVIS, C. J.—I am of opinion that this rule must be made absolute. If authority was wanting, it might be necessary to refer to the construction of the statute of Anne; but for the purpose of arriving at the conclusion that this rule should be made absolute, it is not necessary to enter upon that question, although I shall presently say a few words upon it. As far as this Court is concerned, I think we should be well justified in holding ourselves bound by the case of *Clarke v. Allatt* (a), even though our decision should have indirectly the effect of overruling the authorities in the Court of Exchequer; more particularly as that Court was not aware, when they were overruling *Bird v. Higginson*, that they were overruling, not only the older authorities, but also a recent authority in this Court. We are, I think, bound by the deliberate decision in *Clark v. Allatt* to make this rule absolute.

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But it is impossible to arrive at this conclusion without seeing that we thereby, in fact, overrule *Partridge v. Gardner* and *Howell v. Rodbard*; and it is, therefore, necessary to look at the authorities cited upon the subject, and to say a word or two also upon the statute, in order to shew that the decision we arrive at is correct. In *Yates v. Gun* (b), which is the earliest case on the subject, this Court determined, that under circumstances like the present, the plaintiff was entitled to costs; and *Clarke v. Allatt* is an authority on the same point. So far, therefore, as this Court is concerned, the course of decisions, as has been well observed, has been consistent. The case of *Yates v. Gun* was followed by *Bird v. Higginson*, where the Queen's Bench overruled *Cooke v. Sayer* (c), a decision of their own Court, which they thought unsatisfactory. I was concerned in *Bird v. Higginson*, and I know that it was maturely considered, and that the judgment was prepared with great care by *Littledale, J.* The Court there treated *Richmond v. Johnson*, and *Howard v. Cheshire* (d), as inapplicable to the question before them. Those cases decided, that when

(a) 4 C. B. 335.

(b) Barnes, 141.

(c) 2 Burr. 753; S. C. 2 Wils. 85.

(d) Sayer's Rep. 260.

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a plaintiff is entitled to judgment upon all the issues on the record, but by reason of some collateral matter the judgment does not carry costs, the plaintiff cannot come under the statute of Anne to get his costs. But I think it will be found, on consideration, that those cases do not bear upon the present question, as the Exchequer thought they did. That Court considered themselves bound by authority to take a different view from that which had been adopted by the Queen's Bench; and to hold, that although when the plaintiff succeeds on some issues of fact only, he is entitled to the costs of those issues, yet when he succeeds on all of them, he cannot have the costs of any. Now, I think the observation of my Brother *Williams* (a) in the course of the argument is an answer to that view of the operation of the act. If the statute of Anne is only applicable to cases where the plaintiff would not, independently of it, get costs, it will follow that the plaintiff in *Richmond v. Johnson* (b) could not be entitled to costs under it; for, as he got judgment upon all the issues, he would, but for the certificate interposing, have been entitled to costs under the statute of Gloucester. The statute of Anne, therefore, only applying where the plaintiff could get no costs but for its existence, it clearly was inapplicable in *Richmond v. Johnson* and *Howard v. Cheshire* (c); and those cases were inapplicable to the circumstances existing in *Partridge v. Gardner* (d) and *Howell v. Rodbard* (e). This is perfectly consistent with the construction of the statute. The 4th section enacts, that a defendant may plead several matters; but in order to prevent him from pleading any frivolously, the 5th section provides, that if any such matter shall be found insufficient upon demurrer, he shall pay costs, and so in the same way if he fail upon an issue of fact. In other words, if he chooses to plead immaterial matter, he shall pay the costs arising from his doing so, even though he gets judgment, generally upon the record. It seems, therefore, that the construction

(a) *Vide supra*, p. 759.

(b) 7 East, 583.

(c) Sayer's Rep. 260.

(d) 4 Exch. 303; S. C. 7 D. & L. 106.

(e) *Id.* 309; S. C. *ante*, p. 547.

of the statute warrants *Bird v. Higginson* (a) and *Clarke v. Allatt* (b); and I think it will be found that *Partridge v. Gardner* and *Howell v. Rodbard* proceed upon a misconception of the authorities upon which the Court relied. Both principle, then, and authority, warrant us, I think, in holding that this rule ought to be made absolute.

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WILLIAMS, J.—I am of the same opinion. The case of *Bird v. Higginson* was fully considered; and the judgment which the Queen's Bench pronounced was called for by good sense and propriety, and justified by the reasonable construction of the words of the statute: and it was recognised and acted upon by this Court in *Clarke v. Allatt*. But it appears that since the last mentioned decision, the Court of Exchequer, without having their attention directed to it, have felt themselves called upon to overrule *Bird v. Higginson*; and the question is, whether we ought to be induced to abandon the view we took in *Clarke v. Allatt*. I, for one, should not have hesitated to abandon my own view of the matter, if the Court of Exchequer had pointed out any fallacy by which the Court had been influenced in *Bird v. Higginson*, or any passage in the statute which had been overlooked. But they have not done so, and I can see no reason whatever why I should depart from the authority in this Court.

TALFOURD, J.—I am of the same opinion. The remark of my Brother *Williams*, in the course of the argument, convinces me that the words of the statute may well be satisfied by holding them to apply to all cases where there has been double pleading, whether the plaintiff does or does not fail upon any issue of fact. I have no doubt, on looking at the 5th section of the act, that this case is within it. Its object is to prevent the plaintiff from suffering in the way of costs, in all cases where the defendant has

(a) 5 A. & E. 83; S. C. 6 N. & M. 799.

(b) 4 C. B. 335.

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availed himself of the power given to him by the 4th section of pleading several matters. It is quite obvious that the conclusion to which the Court of Exchequer came was never in the contemplation of the Legislature; and it is unnecessary that we should put upon the act a construction equally absurd and unjust. Therefore, with great respect for the Court of Exchequer, I think there is no ground for departing from the view which this Court has already expressed upon the matter.

Rule absolute.

November 18.

COURTENAY v. EARLE.

[In the Common Pleas.

Coram *Jervis, C. J., Maule, J., Williams, J., and Talfourd, J.*]

A declaration contained eight counts. The first, second, fifth, sixth, seventh and eighth were in case. The third count stated that the plaintiff accepted a bill for 95*l.* for the

accommoda-

tion of defendant and another; and that in consideration thereof defendant *undertook and agreed* to provide 50*l.* in part payment of another acceptance of the plaintiff. Nevertheless the defendant *disregarding his duty*, did not provide, &c. but neglected, &c.; and although plaintiff delivered to defendant the said acceptance for 95*l.*, defendant refused to return it, or take it up when due.

The fourth count stated that the said acceptance for 95*l.*, and another for 161*l.*, being outstanding in the hands of R. S., the defendant *proposed, that if plaintiff would give* him a cheque for 41*l.*, and accept two bills for 100*l.*, *defendant would get back* the above acceptances, or return the proposed bills; that plaintiff gave a cheque and the two proposed bills, and that thereupon *it became defendant's duty* to get back the outstanding bills, or return the others. Yet the defendant, *disregarding his duty*, did not get back, &c., or return, &c.

Held, upon general demurrer, that the third and fourth counts, being in assumpsit, were misjoined with the other counts.

THE first count of the declaration was in case for not providing for a bill for 161*l.* 13*s.*, accepted by the plaintiff, and delivered to the defendant and one Hammick, trading under the firm of H. & E., the plaintiff having subsequently handed to them another bill for 94*l.* 10*s.*, and a sum of money in payment of the former bill.

The second count was also in case for a false representa-

Third count. That afterwards, and before the said bill for 94*l.* 10*s.* became due, to wit, on, &c., the plaintiff, at the request of the defendant and of the said H. & E., and for their accommodation, and without any valuable consideration other than hereinafter next mentioned, accepted another bill of exchange for 95*l.* 10*s.* 6*d.*, payable to the order of the said H. & E. three months after date; and in consideration of such acceptance the defendant undertook and agreed with the plaintiff to provide 50*l.* in part payment of the said acceptance for 94*l.* 10*s.*, at the time when the same became payable. Nevertheless the defendant, disregarding his duty in that behalf, did not nor would, nor would the said H. & E., provide the said 50*l.*, or any other sum whatever, in such part payment of the said acceptance as aforesaid, but on the contrary thereof, wholly neglected and refused so to do; and although the plaintiff, on the faith of the said undertaking to provide the said 50*l.*, delivered to the defendant the said acceptance for 95*l.* 10*s.* 6*d.*, yet the defendant did not nor would, nor did nor would the said H. & E., return or deliver up the said acceptance for 95*l.* 10*s.* 6*d.*, or provide for, or pay the same when due, whereby the plaintiff lost the said sum of 50*l.*, and was compelled to pay the said amount of the said bill for 95*l.* 10*s.* 6*d.*, with costs, to the holder, &c.

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The fourth count stated, that at the time of writing and receiving the thereafter mentioned letter, the defendant and plaintiff had had divers dealings together, and there were outstanding in the hands of one R. S. two bills of exchange, drawn by H. & E. upon and accepted by the plaintiff, viz., the above mentioned bills for 161*l.* 13*s.* and 95*l.* 10*s.* 6*d.* The declaration then set out a letter from the defendant to the plaintiff, which set forth an account making the plaintiff debtor to H. & E. to the amount of 141*l.* 12*s.* 4*d.*, and proposed that the plaintiff should give him a cheque for 41*l.* 12*s.* 4*d.*, and two bills for the remaining 100*l.* at three and four months, in which case the defendant engaged to get back the bills for 161*l.* 13*s.* and 95*l.* 10*s.* 6*d.*, or, failing that, to return him the two proposed

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bills. The declaration then alleged, that the plaintiff afterwards gave the defendant a cheque upon Hoare and Co., bankers, for 24*l.* 8*s.* 4*d.*, and proposed to the defendant that he should accept the said 24*l.* 8*s.* 4*d.* instead of the sum of 41*l.* 12*s.* 4*d.* mentioned in the letter; and that the plaintiff also sent two bills for 50*l.* 3*s.* 6*d.* and 50*l.* 4*s.* 6*d.* respectively, one at three, the other at four months, drawn by the defendant and Hammick upon, and accepted by the plaintiff; that the defendant consented to the said proposal of the plaintiff and received the said cheque and the proceeds thereof instead of the 41*l.* 12*s.* 4*d.*, and received the said cheque and the said two bills for the remaining 100*l.* upon the terms in the letter mentioned, and appropriated the same to his own use. And it thereupon became and was the duty of the defendant to get back and return and deliver up to the plaintiff the said two bills so held by the said R. S., or to return to the plaintiff the two bills which the defendant so contemplated drawing, and which were so, in fact, drawn on the plaintiff and accepted by him and delivered to the defendant; yet the defendant, disregarding his duty in that behalf, and although a reasonable time had elapsed before the commencement of this suit, and although often requested by the plaintiff so to do, did not nor would get back for the plaintiff the two bills so held by the said R. S., or either of them, but wholly failed so to do, or to return or deliver up the same, or either of them, to the plaintiff, and wholly failed and neglected to return to the plaintiff the said other two bills, or either of them, and therein wholly failed and made default, and suffered the said bill for 95*l.* 10*s.* 6*d.* to be and remain outstanding and unpaid in the hands of the said R. S. contrary to his duty in that behalf, and also suffered the said bill for 161*l.* 13*s.* to be and remain outstanding and unpaid, and in the hands of one P. L. and others, as the holders thereof, and did not return the said bills, or any of them, to the plaintiff, whereby the plaintiff was compelled to pay the said two bills so held by the said R. S. and the said P. L. and others, amounting to 257*l.* 3*s.* 6*d.*, with costs, &c.

The fifth, sixth, and seventh counts were in case.

The eighth was a count in trover for the said bills for 161*l.* 13*s.*, 95*l.* 10*s.* 6*d.*, 50*l.* 3*s.* 6*d.*, and 50*l.* 4*s.* 6*d.*

General demurrer and joinder.

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Willes in support of the demurrer. The third and fourth counts, though laid in case, disclose causes of action arising only *ex contractu*, and have, therefore, been improperly joined with the other counts. *Corbett v. Packington* (a) is a decisive authority against such joinder.

Needham, contra. It is admitted that the third and fourth counts are founded upon contract, but the question is, whether the breach of that duty which is imposed by law on the defendant to perform his promise, is not properly the ground of an action of tort. [*Maule*, J.—If so, case will lie for goods sold and delivered]. There are many cases in which a party may sue either in *assumpsit* or case; such as actions against common carriers, against attorneys for negligence, &c. In *Boorman v. Brown* (b), it was held that case would lie against a broker where the breach of duty resulted from an express contract, and not simply from his general employment. [*Maule*, J.—The House of Lords held in that case, that where a man breaks his common law duty, and also his promise, in the course of his employment, he may be sued in either form]. *Tindal*, C. J., in delivering the judgment of the Exchequer Chamber in that case, says: “The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort” (c). The third and fourth counts in this case are grounded upon the neglect to perform that duty which the contract between the parties created. In *Com. Dig.* tit. “*Action upon the Case for Negligence*,” (A. 4), pl. 1, it is

(a) 6 B. & C. 268.

D. 793; Dom. Proc. 11 Cl. & F. 1.

(b) 3 Q. B. 511; S. C. 2 G. & (c) 3 Q. B. 526.

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said: "So if a man neglect to do that which he has undertaken to do, an action upon the case lies: as if any one, who is not a common carrier, undertake to carry goods and deliver them at such a place, if he does not carry them, an action upon the case lies; *R. 2 Cro. 262.*" [*Maule, J.*—Upon referring to that case, I find the action was assumpsit, not case]. Assumpsit is an action on the case. [*Maule, J.*—It is for some purposes as, ex gr., in respect of the Statute of Limitations, 21 Jac. 1, c. 16; but not for the purpose of joinder.] In *Govett v. Radnidge (a)*, the defendants were sued for negligently suffering a hogshead which they had agreed for certain reasonable reward to load, to be damaged in the loading; and it was held that case lay for that breach of duty, although it resulted altogether out of a contract. Lord *Ellenborough* there says; "what inconvenience is there in suffering the party to allege his gravamen, if he please, as consisting in a breach of duty arising out of an employment for hire, and to consider that breach of duty as tortious negligence, instead of considering the same circumstances as forming a breach of promise implied from the same consideration of hire. By allowing it to be considered in either way, according as the neglect of duty or the breach of promise is relied upon as the injury, a multiplicity of actions is avoided; and the plaintiff, according as the convenience of his case requires, frames his principal count in such a manner as either to join a count in trover therewith, if he have another cause of action for the consideration of the Court other than the action of assumpsit; or to join with the assumpsit the common counts, if he have another cause of action to which they are applicable." Here a multiplicity of actions must be the consequence of holding that the third and fourth counts cannot be joined with counts in trover and for misrepresentation.

Willes, in reply. A line must be drawn somewhere; and the decision in *Corbett v. Packington (b)*, indicates the line of demarcation. Where a duty arises at common law

(a) 3 East, 62, 70.

(b) 6 B. & C. 268.

out of a certain known relation between parties, as in the case of master and servant, and there is a promise as well as a duty, the breach of that promise may be the subject of either assumpsit or case. But where there is no such common law duty, and the duty arises out of the promise only, and is only co-extensive with it, tort will not lie, but the action must be in assumpsit for the breach of the promise. [*Williams, J.*—You contend that if the declaration in *Boorman v. Brown* (a), had not stated that the defendant was a broker, it would have been bad, because the promise did not arise out of a duty which the common law cast upon him.] There, although the duty resulted from an express contract, and not simply from the defendant's character as broker, yet it arose in the course of his employment in that capacity; here the third and fourth counts disclose no duty whatever except that which arises in every case where a promise is made, viz., the duty of performing it.

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JERVIS, C. J.—I am of opinion that the defendant is entitled to the judgment of the Court. If *Boorman v. Brown* were an authority for all the expressions in the judgment of the Exchequer Chamber and of the Lords, who heard the case in the House of Lords, the third and fourth counts might possibly be joined with counts in tort. But the principle upon which that case was decided is that wherever there is a duty arising out of a general employment, and also a promise, an action of tort may be brought for a breach of duty, although that breach may consist simply in having done something contrary to the promise made by the party employed in the course of the employment. It is not, perhaps, easy to reconcile that case with all the other authorities; but I think that we cannot hold that this is not a misjoinder, unless we are prepared to say that in every case of goods sold and delivered, the nonpayment is properly the foundation of an action of tort.

(a) 3 Q. B. 511; S. C. 2 G. & D. 793; Dom. Proc. 11 Cl. & F. 1.

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MAULE, J.—I also think that our judgment must be for the defendant. In the case most in favour of the plaintiff, viz., *Brown v. Boorman*, no doubt was suggested that counts in assumpsit and in case could not be joined. In the course of the argument in that case in the House of Lords, Lord *Campbell* asks, “Do you think that, if the money counts had been added here, there might have been a demurrer for misjoinder?” (a) Now, if there be such a thing as misjoinder of counts in case and assumpsit, it exists here. In this declaration there are counts in case, and there is a count in trover; there are also counts in which the plaintiff states that the defendant promised to pay a sum of money in consideration of something, which was a good consideration for the promise. That is exactly such a count as for goods sold and delivered, with an averment of a promise by the defendant to pay for them; or like a count alleging that, in consideration of the plaintiff having done something for the defendant, the latter promised to pay him what was reasonable in that behalf. No modern authority has decided that such counts can be joined. Anciently,—that is, before the late cases,—there is no doubt they could not; and the late cases have not changed the law. The old cases may, perhaps, shew that if an action be brought for anything more than a breach of such a duty as the common law casts on a person simply in respect of his employment in a particular capacity,—that if it be brought in respect of any stipulation modifying that duty, the action for the breach of such a stipulation cannot be framed in case, but must be in assumpsit. If that opinion ever prevailed it has been overruled in *Boorman v. Brown*. But it was clearly understood by the House of Lords, and was sufficiently expressed by them that there might be cases—and if there might, this is one—in which case and assumpsit could not be joined. I, therefore, think that the demurrer is good, and that judgment must be for the defendant.

(a) 11 Cl. & F. 11.

WILLIAMS, J.—I am of the same opinion. We could not uphold this declaration without holding that in every declaration in case a count in assumpsit may be inserted, provided it only varies from the usual form in assumpsit in a few words. Such a doctrine is unsupported by any decision prior to *Boorman v. Brown*; and I do not think that we are constrained by that case to adopt any such doctrine.

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TALFOURD, J., concurred.

Judgment for the Defendant (a).

(a) The question of misjoinder did not arise in *Boorman v. Brown*; and although the House of Lords affirmed the judgment of the Exchequer Chamber, they do not appear to have founded their judgment upon the same grounds. The judgment of Lord Brougham, (11 Cl. & F. pp. 36—40), proceeds upon the ground that the liability of the defendant arose out of a contract, and that that contract was sufficiently disclosed by the declaration to make the latter good after verdict as a count *ex contractu*. Lord Campbell also, although at the end of his judgment he appears to express an opinion in consonance with that of the Exchequer Chamber, founds his decision upon the same view of the case as Lord Brougham. “After verdict,” says his Lordship, pp. 42, 43, “it is immaterial to consider whether this count is framed in tort or in contract. It sets out a cause of action for which the plaintiff is entitled to recover. The cases referred to by the counsel for the plaintiff in error do not apply, because there is no question raised here as to misjoinder or damages, plea in abatement, or

whether a verdict can be sustained against one defendant and not against another. There is only one count, and there is only one defendant; and, after verdict, the question is whether the judgment shall be arrested upon that count, by reason that there is not an express promise to pay, or an express promise to perform the agreement. I apprehend, therefore, that whether this count be in contract or in tort is quite immaterial; it is a count on the case”—(His Lordship here uses that term in its ancient sense, comprising assumpsit as well as case)—“setting out the circumstances and facts of which the plaintiff complains,” &c. Lord Cottenham, indeed, the only other peer present, thought that the declaration was rightly framed in case; but upon the whole, the decision of the House of Lords must be regarded rather as an adoption of the principle governing the case of *Hudson v. Nicholson*, 5 M. & W. 437, where a count framed in case was held after verdict a good count in trespass, than as an affirmance of the grounds of the judgment of the Exchequer Chamber.

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[*Bail Court. Coram Patteson, J.*]

The plaintiff recovered judgment against the defendant in the Court of Exchequer.

Afterwards, on the 1st of January, the defendant, being in custody at the suit of W., petitioned the Insolvent Court, and inserted in his schedule the plaintiff's judgment debt and costs.

On the 12th, the plaintiff lodged a detainer against the defendant upon the judgment. On

the 25th, he withdrew the detainer, and petitioned the Court of Bankruptcy for adjudication of bankruptcy against the defendant, who was, on the same day, adjudged bankrupt. On the following day he was discharged by the Insolvent Court. On the 23rd of July, the Court of Bankruptcy granted a certificate under the 257th section of the 12 & 13 Vict. c. 106, certifying that the plaintiff was a judgment creditor for 71*l.* 7*s.*, which was the amount of the judgment, minus the costs. The defendant having been taken in execution upon a *ca. sa.* issued out of this Court upon that certificate, *Held*, upon motion for his discharge,

First, that the defendant's discharge from arrest upon the judgment did not preclude the plaintiff from arresting him upon the certificate.

Secondly, that the defendant was not protected from such arrest by the 1 & 2 Vict. c. 110, s. 90.

Whether a judgment creditor who has taken his debtor in execution is a good petitioning creditor to support a commission of bankruptcy, *quære*.

But whether he is or not, *Held*,

Thirdly, that where no steps have been taken to supersede the proceedings in bankruptcy, the commissioner's certificate under sect. 257 must be treated as valid.

Fourthly, that the 257th section of the 12 & 13 Vict. c. 106, applies to creditors who have obtained judgment before proof as well as to those who have not.

Fifthly, that the 40th section of 1 & 2 Vict. c. 110, keeps alive the proceedings in the Insolvent Court only for the purpose of reaching the future estate of a bankrupt who obtains his certificate, but has no operation when the bankrupt does not obtain his certificate.

Sixthly, that the 12 & 13 Vict. c. 106, transfers all questions as to the bankrupt's discharge to the Court of Bankruptcy.

THIS was a rule, calling on the plaintiff to shew cause why a writ of *ca. sa.*, issued in this action, should not be set aside for irregularity, and the defendant be discharged out of the custody of the sheriff of Yorkshire as to this action.

The following facts appeared upon the affidavits. The defendant was arrested and committed to York Castle on the 28th of December, 1849, under a *ca. sa.*, at the suit of one Woods; and he filed his petition for protection, in the Insolvent Court for the Leeds district, on the following day. On the 1st of January, 1850, he filed his schedule, in which he inserted the plaintiff as a creditor for 80*l.* 2*s.* 8*d.*, the amount of the debt and costs recovered against him in an action in the Court of Exchequer. On the 12th of the same month, the plaintiff lodged a detainer against the defendant for that judgment debt and costs; but on the 25th, he discharged him from the detainer, and petitioned

for adjudication of bankruptcy against him in the Leeds District Court of Bankruptcy. On the same day, the defendant was adjudged a bankrupt, and a notice of the adjudication was served upon him. On the 26th, the defendant's petition was heard by the Insolvent Court; and, no creditor opposing, an order was made for his discharge. The defendant was afterwards summoned and examined by the Court of Bankruptcy, and the examination was adjourned sine die. On the 23rd of July, that Court, having refused to grant the bankrupt further protection, granted a certificate under sect. 257 of the 12 & 13 Vict. c. 106, in the form contained in Schedule (B a) of the act. It certified that the plaintiff "is a creditor of the said bankrupt for the sum of 71*l*. 7*s*., and that the said bankrupt is not protected by this Court from process against his person." On the 24th of July, the plaintiff sued out a *ca. sa.* in this Court upon the above certificate, and the defendant was, on the 7th of August, again taken into custody and conveyed to York Castle. The defendant swore, in his affidavit, that the 71*l*. 7*s*. was "the same debt (after deducting the costs) for which he was originally detained by the plaintiff." A similar application to the present had been made to *Jervis*, C. J., at Chambers, who refused to make any order.

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Atherton shewed cause. The grounds of this application are, first, that the defendant is protected by his discharge by the Insolvent Court from arrest for the debt for which he has been arrested; and, secondly, that that debt has been satisfied by the plaintiff's withdrawal of his detainer. To take the second point first, it is material to inquire on what process the defendant is now in custody. The 74th section of the 12 & 13 Vict. c. 106, makes the filing of a petition in the Insolvent Debtors' Court, by a trader for his discharge from custody, an act of bankruptcy; and it provides, that if he be adjudged a bankrupt upon the petition of any creditor before he is brought before the

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Insolvent Court,—which was the case here,—his estate and effects shall be divested out of the provisional assignee of the Insolvent Court, and vested in the assignees appointed under the bankruptcy. The 257th section (a) makes creditors, after proof of their debts, judgment creditors; and empowers the Court of Bankruptcy to grant a certificate, which has the effect of a judgment, certifying that the persons who have proved are creditors of the bankrupt, and that he is not protected from personal process. It is then

(a) 12 & 13 Vict. c. 106, s. 257.
“ That the assignees for the time being of the estate and effects of any bankrupt, when the accounts relating to his estate shall have become records of the Court, shall be deemed judgment creditors of such bankrupt for the total amount of the debts which shall by such accounts appear to be due from him to his creditors; and every creditor of any bankrupt, immediately after the proof of his debt shall have been admitted, shall be deemed a judgment creditor of such bankrupt to the extent of such proof; and the Court, when it shall have refused to grant the bankrupt any further protection or shall have refused or suspended his certificate, shall, on the application of such assignees or of any such creditor, grant a certificate under the seal of the Court, in the form contained in Schedule (B a) to this act annexed, and every such certificate shall have the effect of a judgment entered up in one of her Majesty's superior Courts of common law at Westminster until the allowance of the certificate of conformity of such bankrupt;

and the assignees or the creditor to whom, according to such certificate, the bankrupt shall be indebted as therein mentioned, shall be thereupon entitled to issue and enforce a writ of execution against the body of such bankrupt; and the production of any such certificate to the proper officer of any such superior Court shall be sufficient authority to him to issue and seal such writ, and it shall be lawful for such superior Court to make such orders and rules in that behalf as to them shall seem fit; provided always, that every such last-mentioned certificate shall be deemed to have been cancelled and discharged by the allowance of the certificate of conformity of such bankrupt from the time of such allowance; provided also, that no execution by virtue of any certificate which shall be granted to any creditor or assignees as aforesaid shall be issued, nor shall any such certificate or execution in any manner affect any estate or effects which shall come to or be acquired by the bankrupt, after the allowance of his certificate of conformity.”

enacted, by sect. 259 (a), that a bankrupt taken in execution under such circumstances shall not be entitled to be discharged until he shall have been in custody for a year, except by order of the Court. Now, the ca. sa. under which the defendant is at present in custody, was not issued upon the judgment in the action, but solely upon the certificate of the Court of Bankruptcy. It is, doubtless, true, that a defendant taken in execution, and discharged by consent of the creditor, or by competent authority, cannot be again taken in execution for the same debt; but that rule does not apply to the present case. It is based upon the principle, that a creditor shall not have his debt twice satisfied. Where, therefore, the discharge takes place under circumstances which rebut the presumption of satisfaction, the debtor is not protected from a second arrest. Besides, the rule ceases to be applicable where it appears to be at variance with the intention of the Legislature. The defendant is not entitled to be discharged, for he is not in custody for the same debt, or upon process founded upon the judgment on which he was first arrested. The certificate is a subsequent judgment for a different debt; that is, for the original debt minus the costs. The certificate is, by sect. 257, per se, a sufficient authority for the officer to issue the writ; if so, it must be sufficient to prevent this Court from discharging him out of custody. [*Patteson, J.*—The judgment upon which he was first arrested was recovered in an action in the Exchequer; the ca. sa. under which he is now in custody issued out of this Court. That shews that this and the former process are not upon the same judgment.] The

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(a) Section 259. "That if any bankrupt shall be taken in execution after the refusal of protection, or after the refusal or suspension of his certificate, he shall not be discharged from such execution, until he shall have been in prison for the full period of one year, except by order of the Court:

provided always, that this enactment shall not take effect until after the expiration of six months from the commencement of this act, and then only against such persons as shall have been adjudged bankrupt under this act, and for offences committed after the commencement of this act."

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remedy given by sect. 257 is in the nature of a new penal process, for a bankrupt arrested under it is, by sect. 259, to be detained in prison for a year; and the creditor has no power to discharge him out of custody, even upon payment of the debt, except under an order of the Court.

But further, if the defendant be entitled to be discharged from custody, he should have applied, not to this Court, but to the Court of Bankruptcy. The imprisonment under the 257th section is to last for a year, unless the "Court" mentioned in the 259th section, which clearly means the Court of Bankruptcy (*a*), otherwise orders. [*Patteson, J.*—Does sect. 257 apply to a creditor who has already obtained judgment?] It is submitted that it does. The circumstance of the plaintiff being a judgment creditor might, indeed, be a ground for disputing his competency as a petitioning creditor; but this Court will not, upon the discussion of this rule, inquire into the validity of the petitioning creditor's debt, any more than it would into the act of bankruptcy, or any other requisite of a valid commission.

With respect to the first ground upon which the present rule was obtained, reliance will be placed on the 1 & 2 Vict. c. 110, s. 40 (*b*), which enacts, that the vesting order under

(*a*) The interpretation clause, sect. 276, enacts that the term "Court" "shall mean her Majesty's Court of Bankruptcy."

(*b*) 1 & 2 Vict. c. 110, s. 40. "That where the order vesting the estate and effects of any such prisoner in the provisional assignee of the said Court, in pursuance of the provisions of this act, shall be or become void by reason of such prisoner being declared bankrupt within such period as above mentioned, or being an uncertificated bankrupt at the time of such order, the said order shall nevertheless, together with the petition of such

prisoner, if any, remain of record in the said Court; and the said Court shall and may require such prisoner to file his schedule, and shall and may cause such prisoner to be brought up to be dealt with according to this act, and all things to be done thereupon or preparatory thereto, as in other cases, according to this act; and the said Court shall and may, at any time when it shall seem fit, appoint other assignee or assignees in such case in the same manner as in other cases; and that if, at any time after such vesting order shall have been made, such prisoner shall obtain

the Insolvent Act, although avoided by the insolvent being declared a bankrupt, shall be filed, and that the Insolvent Court shall deal with him as it would in other cases. But, assuming that the defendant is entitled to all the benefits of that act, it is submitted that it does not entitle him, under the circumstances of the present case, to his discharge from custody. The benefits which that act confers upon him are to be found in sects. 90 and 91. The former section enacts, "that no person" "entitled to the benefit of this act" "shall at any time thereafter be imprisoned by reason of the judgment" entered up against him under the act, "or for or by reason of any debt, or sum of money, or costs, with respect to which such person shall have become so entitled, or for or by reason of any judgment, decree, or order for payment of the same;" but if arrested, he may be released by a Judge of the Court out of which the process issued: and sect. 91 protects his property from execution for any debt, &c. to which the adjudication extends. It is submitted, that the defendant does not come within either section; for this is neither a "debt," nor "a judgment, decree, or order for payment of the same," with respect to which the defendant has become entitled to his discharge. The provisions of that act are applicable only to the state of

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his certificate under any such fiat in bankruptcy, the rights, powers, title, and interest of the provisional assignee and other assignee or assignees appointed under this act, in, over, and respecting any property, real or personal, whatsoever, remaining to such prisoner after the obtaining of such certificate, or thereafter in any way coming to him, and under or in pursuance of the warrant of attorney to be executed by such prisoner under the provisions of this act, shall from and after the obtaining of such certificate, be the same as if the

vesting order made under this act had been valid at the time of the making thereof: provided always, that nothing herein contained shall be construed to affect the title, rights, and interests of the assignees under any such fiat in bankruptcy, or to alter or diminish the effect of any such certificate as aforesaid, but that the title, rights and interests of such last mentioned assignees, and the benefit of such certificate to such prisoner, shall be the same to all intents and purposes as if this act had not been made."

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the law as it existed when it was passed; but no enactment similar to the 257th section of the 12 & 13 Vict. c. 106, then existed. If the 1 & 2 Vict. c. 110, s. 90, and the 12 & 13 Vict. c. 106, s. 257 are in any degree inconsistent, the later enactment must override and qualify the earlier one. If the defendant's contention be correct, the penal provision of the 257th section might, in every case, be rendered inoperative by the insertion of all the insolvent's creditors in his schedule.

If the rule be discharged, it is submitted it should be discharged with costs, as it is in the nature of an appeal from the Judge at Chambers; and if made absolute, it should be made a term that no action shall be brought.

Hugh Hill, in support of the rule. First, as the defendant was discharged under the Insolvent Act, he was not liable to be arrested again for the same debt. It is submitted, that the defendant was arrested "for and by reason of" a "sum of money," within the meaning of the 1 & 2 Vict. c. 110, s. 90, "with respect to which" he was entitled to his discharge under the Insolvent Act. There is, no doubt, some difficulty in construing sects. 39 and 40, with respect to the mode in which the Courts of Bankruptcy and Insolvency become possessed of the debtor's estate and effects. Probably, under sect. 39, the administration of the existing estate and effects of the bankrupt is taken out of the Insolvent Court and vested in the Court of Bankruptcy, while the administration of the subsequently acquired property remains in the Insolvent Court. [*Patterson*, J.—The 90th section says, "any Judge of the Court from which any process shall have issued in respect thereof" may discharge the prisoner. Has the Court power under this section to do so?] The same words are used in the 14th section, which gives a "Judge of one of the superior Courts" power to charge stock; and it has been decided, that the Court has jurisdiction to make such an order. Besides, in such cases there is always an appeal to

the Court from the decision of the Judge (*a*); and here there has been a previous application to a Judge at Chambers, who has declined to interfere. To understand the 257th section of the 12 & 13 Vict. c. 106, the certificate given by it, contained in Schedule (B a), must be looked into. It is entitled, a "certificate to assignees or to a creditor to entitle them to issue a writ of execution." Before the passing of this act, a creditor who proved under a fiat could not afterwards proceed at law against the bankrupt. The intention of sect. 257 was to alter the law in this respect, and to enable a creditor, in cases in which the Court of Bankruptcy thought fit to give a certificate, to take the bankrupt in execution. It could not have been intended to make the liberty to take out execution against the bankrupt an indirect mode of inflicting a penal imprisonment. Here, however, there was no good petitioning creditor's debt. The cases before the stat. 6 Geo. 4, c. 16, shew that where a creditor had once taken his debtor in execution, he could not afterwards be a petitioning creditor in respect of the same debt. It was so held in *Cohen v. Cunningham* (*b*), where *Burnaby's case* (*c*) was cited and relied on. In *Baker v. Ridgway* (*d*), a commission was sued out against the defendant, who was in custody under a ca. sa. The plaintiff, in order to prove his debt, discharged him from an execution at his suit; and the commission being afterwards superseded, the plaintiff retook the defendant in execution. The Court of Common Pleas held that, under ordinary circumstances, he was entitled to his discharge; but as in that instance the commission and supersedeas had been fraudulently obtained, they refused to discharge him. The 6 Geo. 4, c. 16, s. 59, renders a debt, for which the bankrupt is already in custody at the suit of a creditor, proveable under the commission, if the creditor give a

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(*a*) See *Robinson v. Burbidge and Another*, ante, pp. 94, 98, 99. See, however, contra, *Graham v. Connell*, ante, p. 438.

(*b*) 8 T. R. 123.

(*c*) 1 Stra. 653.

(*d*) 2 Bing. 41; S. C. 9 Moore, 114.

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sufficient authority for the discharge of the bankrupt; but it does not make it a valid petitioning creditor's debt. The 257th section may be satisfied by construing it as applying to those cases only in which the creditor has not obtained judgment for his debt.

At any rate, the defendant is entitled to have this rule made absolute, on the ground that he has been already taken in execution, and discharged by the plaintiff's own act, for the same debt. The cases on the subject are collected in *Tidd's Pract.* 174, 9th ed. Here, the defendant was discharged in respect of the debt which was inserted in his schedule in the Insolvent Court. Suppose a person privileged as a chaplain in ordinary to her Majesty were discharged from arrest on the ground of his privilege, could it be successfully contended that he might be again taken in execution for the same debt? So here, the defendant having been once discharged by a competent authority, cannot be again taken in execution.

Cur. adv. vult.

PATTESON, J.—The plaintiff in this case had recovered a judgment against the defendant, and taken him in execution under a ca. sa. The defendant petitioned the Insolvent Court, and thereby committed an act of bankruptcy. The plaintiff agreed to his discharge, and sued out a petition in bankruptcy, after which the Insolvent Court discharged the defendant. The proceedings in bankruptcy went on; the plaintiff proved his debt, and ultimately the Commissioner before whom they took place granted a certificate to the plaintiff under the 257th section of the 12 & 13 Vict. c. 106. [His Lordship here read that section, as also the 259th (a), and the form contained in the schedule to the act, (B a).] A ca. sa. issued out of this Court on the production of that certificate, under which the defendant is now in custody. It is contended that he ought to be discharged principally on two grounds:

(a) See these sections, *supra*, pp. 774, 5, in *notis*.

First, that the 257th section does not apply to creditors who have obtained judgment before proof.

Secondly, that the plaintiff, having voluntarily discharged the defendant, was not a good petitioning creditor, and therefore cannot proceed on the Commissioner's certificate.

As to the first, I am clearly of opinion that the section applies to all creditors who prove their debts, whether those debts be on judgments or not; otherwise judgment creditors would be put in a worse situation than simple contract creditors, which never could have been the intention of the Legislature. All creditors who prove under a fiat or petition, thereby make their election; and they were precluded from enforcing their claims against the bankrupt by action or execution, until the recent act of Parliament gave them the power of doing so by means of the Commissioner's certificate. They are still precluded from suing the bankrupt, or issuing execution on their judgments, if they have any; but it is plain that the 257th section makes them judgment creditors *de novo*, as it were, and the certificate of the Commissioner enables them to proceed as such by *ca. sa.* only. If, therefore, the plaintiff had been merely a judgment creditor, not having taken the defendant in execution, and had proved, the proceedings would clearly have been quite regular.

Further, if he had not been petitioning creditor, but had taken the defendant in execution, and another creditor had sued out the petition, the proceedings would, I think, still have been regular. Such a judgment creditor is not satisfied, so far as relates to bankruptcy proceedings. By sect. 59 of 6 Geo. 4, c. 16, he is enabled to prove, but not "without giving a sufficient authority in writing for the discharge of such bankrupt." That was a legislative enactment that taking a debtor in execution should be no satisfaction of the debt, so as to prevent the creditor from proving in bankruptcy; and that discharging him should not have such effect; for the discharging is made a condition of enabling the creditor to prove.

The provision as to creditors having their debtors in

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execution, is, however, omitted in the corresponding section of 12 & 13 Vict. c. 106, viz., sect. 182,—for what reason I know not; but the omission can, at most, have the effect only of leaving such creditors in the situation in which they were before 6 Geo. 4, c. 16; and that is, that by the practice of the Court, though not by express law, they were enabled to prove.

The case, therefore, is reduced to the question, whether the fact of the plaintiff, being petitioning creditor, alters his position in this respect, and whether I can treat all the proceedings as void on that account. In *Cohen v. Cunningham* (a), it was held, that a plaintiff who had taken his debtor in execution could not petition, though the Court of Chancery, or rather the Lord Chancellor sitting in bankruptcy, was in the habit of allowing such creditor to prove under a commission issued on the petition of another person. Probably that case may govern and be decisive whenever the same point shall directly arise; but assuming it to be so, the well known power, given by acts of Parliament subsequently to that case, of substituting a good petitioning creditor in lieu of one whose debt is insufficient, has provided a remedy for such mischance, and rendered it less proper for a Court of law to hold all the proceedings void, especially upon motion. As, therefore, no steps have been taken in bankruptcy to supersede the proceedings, but they have been carried on altogether as being good, and the plaintiff has been allowed to prove, I cannot hold that the certificate of the Commissioner under the recent act is void: consequently, I think the *ca. sa.*, as matters now stand, is regular.

A point was made as to the effect of the 40th section of 1 & 2 Vict. c. 110 (b), under which it was contended that the Insolvent Court could discharge the Insolvent absolutely, notwithstanding the proceedings in bankruptcy. (His Lordship here read the section). Upon considering that section in connection with the rest of the act, I am of

(a) 8 T. R. 123.

(b) See the section *supra*, p. 776, n. (b).

opinion that it was intended to keep alive the proceedings in the Insolvent Court, only for the purpose of reaching the future estate of any bankrupt who should obtain his certificate,—that is, any estate acquired by him after such certificate,—through the means of the warrant of attorney directed by that act; and that it has no operation where the bankrupt, as here, does not obtain his certificate. I also think that the recent act 12 & 13 Vict. c. 106, transfers all questions as to the bankrupt's discharge to the Bankrupt Court.

This rule must therefore be discharged, but without costs.

Rule discharged accordingly.

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DEERE v. KIRKHOUSE.

November 25.

[*Bail Court. Coram Patteson, J.*]

THIS was a rule, calling on the plaintiff to shew cause why the defendant should not be allowed his costs of suit, to be taxed by one of the Masters; and why the plaintiff should not pay the same, after deducting the sum of 7*l.* recovered in this action; or why, in default thereof, the defendant should not be at liberty to issue execution for the same, after deducting such sum as aforesaid, pursuant to the 12 & 13 Vict. c. 106, s. 86.

The following facts appeared upon the affidavits. The plaintiff filed an affidavit of debt, under the 12 & 13 Vict. c. 106, s. 78, against the defendant, a trader, for 128*l.* 8*s.* 11*d.*; and the defendant thereupon entered into a bond, under

Where a cause alone is referred, and the costs of the cause and of the reference are to abide the event, the costs of the reference are costs of the cause, and follow its event.

The defendant's costs under the 12 & 13 Vict. c. 106, s. 86, are to be deducted from the debt or

damages recovered by the plaintiff, and not from the debt or damages, and the plaintiff's costs added together.

Upon an application by defendant under the 12 & 13 Vict. c. 106, s. 86, for his costs, the date of the commencement of the action is sufficiently shewn by the statement of the writ of summons in the issue delivered by the plaintiff, without any express averment to that effect upon the affidavits.

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the 80th section, to pay such sum as the plaintiff might recover by action. The present action of debt for work, labour and materials, and goods sold and delivered, was consequently brought; to which the defendant pleaded, with several other pleas, payment of 17*l.* 17*s.* 5*d.* into Court. Upon the trial of the cause at the Glamorgan-shire Summer Assizes, in the present year, a verdict was taken by consent for the plaintiff for the amount claimed, subject to the certificate of a gentleman of the bar, who was to certify for whom, and for what amount, if any, the said verdict should be entered, "the costs of the said cause, and also the costs of this reference, to abide the event of the said certificate, to be taxed by the proper officer." The arbitrator certified, that "over and above the sum paid into Court, the defendant was and is indebted to the plaintiff in 8*l.*, parcel of the debt in the declaration mentioned;" and after deducting 1*l.*, due from the plaintiff to the defendant on a set-off, ordered the defendant to pay the plaintiff 7*l.*, being the balance. The affidavits did not state when the action was commenced, but in the issue delivered by the plaintiff, and which was annexed to one of them, the date of the writ of summons was stated to be the 9th of February, 1850.

Gray shewed cause. First. This is an application under the 12 & 13 Vict. c. 106, s. 86, which only applies to actions "brought after the commencement of this act," (1st of August, 1849); and it is not shewn upon the affidavits that the present action was not commenced before. It is true the issue states the date of the writ of summons; but it cannot be looked to for this purpose. It is not equivalent to a statement upon oath. A mistake may have been made, either accidentally or designedly, in making up the issue, and the plaintiff would not be indictable for perjury.

Secondly. The defendant cannot make this application after having consented to a reference. If the costs of the

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cause only had been made to abide the event, the Court would, perhaps, hold that the event of the action was meant; but here those of the reference also are to abide the event, which must mean the event of the reference, and that is in the plaintiff's favour. The plaintiff can obtain the costs of the reference only as part of the damages for which the judgment is entered up, pursuant to the certificate of the arbitrator; and, therefore, does not stand on the same footing as if he had not referred the cause. In *Griffiths v. Thomas* (a), the costs of the action were to abide the event; and the Court held that that meant, not the event of the action, but the event of the reference. In *Jones v. Jehu* (b), it was held, that if a cause and all matters in difference are referred, and the arbitrator makes a separate adjudication as to the action, the defendant is not precluded from applying for his costs under the 43 Geo. 3, c. 46, because other matters in difference are included in the reference. It may be inferred from the judgment in that case, that if a separate adjudication is not made as to the action, but it is treated as a part of other matters referred, so that a mode of trial different from that before a jury may have been adopted, the defendant cannot move under a statute disentitling the plaintiff to costs. [*Patteson, J.*—In the present case, nothing is referred but the action.] The ground of the rule is, that the costs of the action cannot, in such a case, be separated from the costs of the reference. Here it is equally impossible to separate the costs of the reference from those of the cause. The plaintiff could only recover the former by taxing them as costs of the latter. [*Patteson, J.*—You assume that the plaintiff is entitled to the costs of the reference at all events; but they are to abide the event, and are costs in the cause. The arbitrator here has no power to award the costs of the reference to either party.]

Thirdly. The 12 & 13 Vict. c. 106, s. 86, only says that,

(a) 4 D. & L. 109.

(b) 5 Dowl. 130.

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in cases within it, costs shall be allowed to the defendant, and that the plaintiff shall be disabled from taking out any execution "for the sum recovered in any such action;" unless the same exceeds the amount of the defendant's taxed costs. Independently of this statute, the plaintiff is entitled to his costs by the Statute of Gloucester (6 Edw. 1, c. 1, s. 2), which gives them in the nature of damages. The amount of the defendant's costs is therefore to be deducted, not from the amount only for which the certificate is given, but from that amount and the costs added together (a).

Lush, in support of the rule. As to the first objection, the date of the commencement of the action is sufficiently shewn by the date of the writ of summons as set out in the issue; but the record itself is also before the Court, and may be inspected for the purpose of ascertaining when the action was commenced.

As to the second, the case of *Jones v. Jehu* (b), which has been referred to, is an express authority in the defendant's favour. There are several cases which shew, that where a verdict is taken subject to a reference, and the costs of the cause are to abide the event, the event of the action is meant; and the statutes depriving the plaintiff of costs, apply in the same way as if the amount recovered had been found by a jury. *Summers v. Grosvenor* (c), is an instance. The cases will be found collected in *Russell on Awards*, pp. 385—8. In *Tregoning v. Attenborough* (d), no mention was made in the order of reference of the costs of the reference; and it was held that they might be taxed as costs in the cause. In *Taylor v. Lady Gordon* (e), there were other matters in difference between the parties.

The third objection, if well founded, would render the 86th section of the statute nugatory.

(a) A point was also argued upon the existence of reasonable and probable cause for making the affidavit of debt, as disclosed upon the affidavits.

(b) 5 Dowl. 130.

(c) 2 C. & M. 341.

(d) 7 Bing. 733; S. C. 5 M. & P. 453; 1 Dowl. 225.

(e) 9 Bing. 570; S. C. 2 M. & Scott, 725; 1 Dowl. 720.

PATTESON, J.—As to the first objection, viz., that it is not stated in the affidavits that this action was commenced after the statute came into operation, it appears that in the issue which is attached to one of the affidavits the date of the writ is given, which is some time after the statute came into force. As this is made up and delivered by the plaintiff himself, I think it sufficiently appears for the purpose of the present application, that the action has been commenced since the statute came into operation.

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Next, it is said that this application cannot be made after the defendant has agreed to the reference of the cause. It is, however, clear, that where the verdict is taken subject to a certificate, the costs of the action and of the reference to abide the event, and no other matters in difference are referred, the costs of the reference are costs in the cause; and it cannot be said that where a party is entitled to the costs of the reference merely as costs in the cause, if any law prevents him from recovering costs in the cause, he should not also be prevented from recovering the costs of the reference.

With respect to the last objection that the costs are to be deducted not from the sum recovered as the amount of the debt or damages, but from the debt or damages, and costs added together, the language of the act is not very precise, but it is the same or nearly the same as that used in 43 Geo. 3, c. 46; and I apprehend it must be taken to mean, as in that statute, from the sum recovered as the amount of the plaintiff's claim independent of costs; for it could never be meant that the plaintiff was first to have his costs allowed him, and then to have the amount of the defendant's costs deducted from them, which would virtually render the statute inoperative.

It comes then to the question whether I can see that the plaintiff had reasonable and probable cause for making an affidavit of debt to this amount against the defendant, and I think I cannot do so. (His Lordship here referred to the facts of the case, and concluded by making the rule absolute).

Rule absolute.

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November 23. **DEVEREUX v. THE KILKENNY AND GREAT SOUTHERN AND WESTERN RAILWAY COMPANY.**

[In the Exchequer of Pleas.

Coram *Pollock, C. B., Parke, B., Alderson, B., and Platt, B.*]

Whether execution upon a judgment recovered against a railway company governed by the provisions of the Companies' Clauses Consolidation Act, should issue against a shareholder, depends not only upon the plaintiff's failure to find sufficient property and effects of the company to satisfy his judgment, but also upon his having used due diligence to find such property and effects.

Whether he has used such due diligence is a preliminary matter, to be decided by the Court upon the motion for leave to issue such execution.

Semble, that the proper form of issuing execution under the 8 & 9 Vict. c. 16, s. 36, against the shareholder of a railway company, is by *sci. fa.*

PEACOCK moved for a rule, calling on George Emery to shew cause why a writ of *scire facias* should not issue against him, as a shareholder of the Kilkenny and Great Southern and Western Railway Company, for the sum of 890*l.* 8*s.* 2*d.*, being the balance due to the plaintiff upon a judgment obtained against that company in this cause.

The affidavits in support of the rule stated the following facts. The company was incorporated by the statute 9 & 10 Vict. c. ccclx., (local and personal, public), which embodied the several Railway Consolidation Acts, including the Companies' Clauses Consolidation Act (8 & 9 Vict. c. 16). The plaintiff recovered judgment in this action for 1140*l.* 8*s.* 2*d.*, including costs; and of that sum 890*l.* 8*s.* 2*d.* still remained unpaid. Writs of *fi. fa.* had issued against the company into Surrey and Middlesex, the counties where the venue was laid; and in the latter of which the company had an office, but the sheriffs had returned to both, *nulla bona*. The affidavits also stated, that the plaintiff's attorney had made several applications at the company's office to inspect the register of shareholders, but had not been allowed to do so; that the name of George Emery

was found registered in the "joint stock registry," as a subscriber to the company to the amount of 25,000*l.*; that the plaintiff had employed due diligence to obtain satisfaction of his judgment from the effects of the company, but had been unable to do so; that Emery was believed to be still a shareholder, and that at a meeting held in August, 1850, he had moved the adoption of a report which stated, that "in consequence of calls not having been duly responded to, the directors were unable to free the company from its pecuniary engagements; that two judgments had been obtained against the company, viz., one in this cause, and the other at that of one Hichins; and that the directors being unable to satisfy these suits from the limited funds in hand, had no alternative but to let the creditors take such steps to procure the fruits of their judgments as they might be advised; that the accounts of the company shewed that a balance of 86*l.* remained to its credit on the 30th of June," &c.

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Peacock. The present application is made under sect. 36 of the Companies' Clauses Consolidation Act, (8 & 9 Vict. c. 16), which provides, that where execution cannot be had against the effects of the company, it may issue against a shareholder; but only "upon an order of the Court." Under a similar provision in the Banking Companies' Act, 7 Geo. 4, c. 46, s. 13, the practice has been to issue a *sci. fa.*; but the language of the two acts differs materially, and it may be doubted whether, under the statute under which the application is made, a motion in Court for leave to issue execution, is not sufficient without *sci. fa.* The Court of Common Pleas have, however, lately decided that a *sci. fa.* is necessary (*a*); and it has, therefore, been thought safer to ask the Court for leave to issue that writ. The facts stated in the affidavits clearly justify the Court in granting the application.

(*a*) Since reported, *Hichins v. Kilkenny, &c., Railway Company, ante*, p. 712.

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Slade shewed cause in the first instance. The facts stated do not entitle the plaintiff to a sci. fa. First, it does not sufficiently appear that Emery is now a shareholder. The proper evidence of his being a shareholder is the sealed register, which, by sect. 9 of 8 & 9 Vict. c. 16, the company is required to keep; *Newry and Enniskillen Railway Company v. Edmunds* (a). If his name be improperly omitted from it, the plaintiff may apply for a mandamus to compel the company to enter it. It is, indeed, alleged that the "joint stock registry" has been searched, and that Emery's name has been found there; but it does not appear when that search was made. It is quite consistent with that statement that Emery is not now a shareholder.

Secondly, the affidavits do not negative the existence of property belonging to the company in Ireland. As the plaintiff gave credit to an Irish company, he ought not to be allowed to proceed against a shareholder in this country until he has shewn that the company has no property or effects in the country where it may be most reasonably expected that they should be found, viz., in Ireland. Whether or not there is such property is a fact which ought to be stated on the scire facias, so that it may be traversed. The matter being entirely in the discretion of the Court, it is submitted that on these two grounds they will refuse the application. [*Parke*, B.—This subject has already been before us under the Banking Act, 7 Geo. 4, c. 46. In *Dodgson v. Scott* (b), which was argued before me, I held that the question, whether reasonable and proper efforts had been made to obtain payment from the parties primarily liable, was a question for the discretion of the Court; but that the fact of a person's having been a partner at the time when the contract was entered into, should appear on the sci. fa., and be tried by a jury. In *The Bank of England v. Johnson* (c), the same question was argued before

(a) 2 Exch. 118.

(c) 3 Exch. 598; S. C. 6 D.

(b) 2 Exch. 457; S. C. 6 D. & L. 458.

& L. 27.

the full Court, which adopted the view which I had taken in *Dodgson v. Scott*. We thought that a sci. fa. for execution against those who were members at the time of the contract, should state the prior execution against the members at the time of the execution. Now, it would seem, by parity of reasoning, that that fact should be shewn here.]

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Peacock, in reply. If there is no sufficient property belonging to the company in England to satisfy the plaintiff's execution, the Court will allow execution to go against a shareholder.

POLLOCK, C. B.—The rule must be made absolute. The application is made under 8 & 9 Vict. c. 16, s. 36, by virtue of which the Court has power to award execution against shareholders of a company against which a plaintiff has obtained judgment, if there cannot be found sufficient property and effects of the company to satisfy it. The Court of Common Pleas has decided, we are told, that execution in these cases cannot issue without a scire facias (a). As the power given is to issue execution and not a scire facias, and that power is created by statute, a doubt might arise whether we could issue a scire facias. As, however, the execution is to issue upon certain facts stated to the Court, we must have the power to investigate those facts; as, for example, where an executor comes for a scire facias, he must allege that he is executor, and that allegation may be so traversed that it may be tried by a jury. It appears to me to be much better that those facts should be tried on the traverse to the scire facias, than by our directing an issue to try them: in any case, therefore, I think therefore that the scire facias should be granted. I do not say that we have not power to issue execution in another form, but I think that writ the most convenient form; and I state this to ex-

(a) Since reported, *Hichins v. The Kilkenny, &c., Railway Company*, ante, p. 712.

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clude any inference that I either concur in, or dissent from, what is stated to be the opinion expressed by the Court of Common Pleas. It does not form any part of our judgment in the present case to say whether execution, without a scire facias, may issue or not; but it is worthy of observation, that in the earlier act, 7 & 8 Vict. c. 110, s. 68, it is said that execution may issue by leave of the Court, or a Judge, upon motion or summons, "without any suggestion of scire facias;" whereas in the latter act, 8 & 9 Vict. c. 16, s. 36, under which we are now acting, it is only said that "execution may be issued," and there is no mention of a scire facias. It may be that the Legislature, having once adopted the course of proceeding established by the earlier act, thought that it was unnecessary to re-enact it. We need not, however, now decide that question.

PARKE, B.—I am of the same opinion. The only question is, whether a scire facias should issue. I think that sufficient facts have been shewn to justify us in granting the application. On the scire facias it must be stated, as was done in *The Bank of England v. Johnson* (a), that execution has issued against the goods of the company, and that they have not been found sufficient to satisfy the judgment. Whether due diligence has been used to obtain execution against the goods of the company is a preliminary matter, to enable the Court to form an opinion whether execution ought to issue; and in the exercise of our discretion, we must consider whether the plaintiff has used due diligence to obtain satisfaction from the Irish property belonging to the company. I think the statement in the report shews that a *primâ facie* case has been established; and the rule should, therefore, be made absolute.

ALDERSON, B.—It is clear that on the three points a scire facias should issue; as to the last,—whether due

(a) 3 Exch. 598; S. C. 6 D. & L. 458.

diligence has been used by the plaintiff to obtain from the Irish property satisfaction of the execution,—that is a matter for the discretion of the Court; and I think, on the statement of Mr. Emery at the meeting, that there was no property of the company whatever, we may let the scire facias go.

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PLATT, B.—I think the scire facias should be granted; and I also think that that is the proper mode of proceeding. The facts in litigation between the parties ought to be decided by a jury, without our awarding an issue. That is the proper tribunal for deciding questions of fact, and not the Court, whose duty is, not to try facts, but to expound law. A scire facias, though in one sense an original action, is, in a case like this, only a continuation of the original cause—it is a scire facias upon a judgment; giving to the party against whom it is issued an opportunity of denying the facts alleged in it. I think that the facts which are here shewn sufficiently justify us in allowing the scire facias to issue against Mr. Emery.

Rule absolute.



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November 14,
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SMITH and Another v. LOVELL.

[In the Common Pleas.

Coram *Jervis, C. J., Maule, J., Williams, J., and Talfourd, J.*]

I. The first count of the declaration, after alleging that plaintiffs were tenants of

THE judgment of the Court in this case sufficiently sets forth the substance of the pleadings to render any statement of them in this place unnecessary.

chambers to H., at the rent of 84/., stated, that upon their letting those chambers to defendant as their tenant at the rent of 84/., defendant promised to pay the said rent to H., or, if not, that he would indemnify plaintiffs in respect thereof, and would pay the same to them. Averment, that rent became due from plaintiffs to H., that defendant did not pay H., but plaintiffs paid him, and requested defendant to pay them, who refused, &c.

Whether the above count means that defendant promised to pay to H. the rent due from plaintiffs to H., or the rent due from defendant to plaintiffs, *quære*?

Held, however, that it does not mean that defendant's promise was to extend further than his liability to pay rent under his own tenancy to plaintiffs.

II. Sixth plea, that before the rent grew due from plaintiffs to H., defendant's tenancy ended by operation of law, by his delivering up possession to plaintiff C.

Replication, that defendant of his own wrong delivered up possession; because it had been agreed, that if plaintiffs gave defendant notice to determine the agreement between them and defendant, they would not prevent his becoming tenant to H.; that they were always and still ready and willing to suffer him to occupy as tenant to H., and had not prevented him; that plaintiffs received possession of the chambers from defendant for the purpose of letting them for him; that they refused to accept possession except upon the terms that defendant should not be released from his liability, and that possession was taken on no other terms. Without this that the term was surrendered by operation of law, &c.

Held, upon special demurrer, that the replication was bad, on the ground that the inducement was inconsistent and incongruous with the traverse.

III. Seventh plea, that before the same rent became due, it was agreed between C., one of the plaintiffs, on behalf of himself and his co-plaintiff, and defendant, that the latter should deliver up the chambers to plaintiff C., and be discharged from further liability; and that possession was accepted accordingly.

Replication, traversing that it was agreed between plaintiff C. on behalf of himself and his co-plaintiff, and defendant, that defendant should be discharged from further liability, and that possession was accepted accordingly.

Held, first, that the seventh plea set up a good defence;

Secondly, that the replication was too large, for traversing not only that the agreement was made by C., but also that it was made by him on behalf of himself and his co-plaintiff.

Thirdly, that this was an objection of substance, and available upon general demurrer.

Whether the replication was not also double and multifarious for denying the acceptance of possession as well as the agreement, *quære* (a).

IV. Eighth plea, that before the same rent became due, plaintiff C., with the sanction of his co-plaintiff, evicted defendant.

Replication, traversing eviction by C., with the sanction of his co-plaintiff.

Held, that the replication was too large.

V. The second count was for use and occupation; the third upon an account stated.

Eleventh plea, to those counts, that after the causes of action accrued, defendant was discharged by order of the Insolvent Debtors' Court.

Replication, as to so much of the plea as relates to the third count, that the cause of action accrued after the order.

Held, that the replication was bad, as amounting to an argumentative traverse of the plea.

(a) See *Buttidge v. Booker*, ante, p. 441.

Willes, for the defendant, cited *Gore v. Wright* (a); *Morrison v. Chadwick* (b), and *Wallace v. Kelsall* (c).

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H. T. Coles, for the plaintiffs, referred to *Harley v. King* (d); *Bythewood's Precedents in Conveyancing*, vol. 4, p. 171, and *Monkman v. Shepherdson* (e). [*Williams, J.*, referred to *Wolveridge v. Steward* (f).]

JERVIS, C. J., now delivered the judgment of the Court.—In this case, there is no little difficulty in construing the first count of the declaration. It alleges that the plaintiffs were tenants of certain chambers to one Heale, at the rent of 84*l.* per annum, payable quarterly; and that, in consideration that they would demise and underlet the chambers to the defendant, to hold as their tenant, at a rent of 84*l.* payable quarterly, he promised them that he would pay the said rent to Heale, and that, if he should not do so, he would indemnify them in respect thereof, and would pay the same to them. The declaration then avers, that the plaintiffs did let the chambers to the defendant on the terms aforesaid, and that, under that demise, he held the chambers; that large sums of money, parcel of the rent aforesaid, became due from the plaintiffs to Heale; that the defendant did not pay them to Heale; that the plaintiffs paid him, and requested the defendant to pay them; but that he hath not done so, &c.

It is not easy to say whether, by this statement, the plaintiffs mean to allege the contract to have been that the defendant promised to pay Heale the rent due from them to Heale, or the rent due from the defendant to them under the demise which is the consideration for his promise. But, whichever may be meant, the plaintiffs cannot, we

(a) 8 A. & E. 118; S. C. 3 N. Dowl. 841.
& P. 243.

(b) 7 C. B. 266; S. C. 6 D.
& L. 567.

(c) 7 M. & W. 264; S. C. 8

(d) 2 C., M. & R. 18.

(e) 11 A. & E. 411.

(f) 3 M. & Scott, 561.

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think be understood as intending to allege that the defendant's promise to pay Heale, was to extend further than his liability to pay rent under his own tenancy to the plaintiffs; and, consequently, we are of opinion that the sixth plea,—which is addressed to 84*l*. parcel of the rent mentioned in the first count, and which sets up as a defence, that, before it grew due from the plaintiffs to Heale, the tenancy of the defendant to the plaintiffs had ended by a surrender by operation of law (*a*),—is a good plea.

The plaintiffs have replied to it, by way of special traverse (*b*). To this replication the defendant has demurred

(*a*) Scil. by defendant quitting possession of the chambers by the license of the plaintiff Coles, and by the defendant delivering up the keys of the chambers to Coles, and relinquishing possession to him, with the intention of putting an end to the tenancy. The plea also averred that the defendant had not since occupied the Chambers; that the plaintiff Coles, in giving such license and accepting the keys, acted on behalf of himself and his co-plaintiff, and that the plaintiff Coles has ever since continued in possession, with the assent of his co-plaintiff.

(*b*) The replication stated that the defendant, of his own wrong, quitted possession of the chambers; because it was agreed between the plaintiffs and the defendant, in consideration of the defendant becoming tenant and indemnifying the plaintiffs as in the first count mentioned, that in case the plaintiffs should give the defendant notice to terminate that agreement, and the defendant should be desirous of continuing his occupation of the premises as tenant of Heale, the plaintiffs

should not occupy the premises, or prevent any arrangement for the occupation of them by the defendant under Heale; that the plaintiffs were always, and still were, ready and willing to suffer the defendant to continue the occupation of the chambers under Heale, and that they did not interfere to prevent any arrangement for that purpose; that the plaintiffs received the keys of the chambers, and took possession at the request of the defendant to let the chambers for the benefit of the defendant; that they refused to receive the keys from the defendant except on the terms that the defendant should not be released from his liability in respect thereof; and that the keys and the possession of the chambers were received by the plaintiffs on no other terms or conditions than on the terms that the defendant should not be released from his liability under the agreement in the first count mentioned. Without this that the estate, term, and interest was surrendered by operation of law, &c.

specially, on the ground that the inducement is inconsistent and incongruous with the traverse. And we think that it plainly is so ; and therefore our judgment on this demurrer must be for the defendant.

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The seventh plea is likewise addressed to the same sum of 84*l.* ; and it alleges, that, before it became due from the plaintiffs to Heale, it had been agreed by and between the plaintiff Coles, for and on behalf of himself and the plaintiff Smith, and with his authority, and the defendant, thatt he defendant should quit and deliver up the possession of the chambers to the plaintiff Coles ; and that, in consideration thereof, the defendant should be discharged from all further liability to pay any rent for the chambers ; and that the defendant did accordingly deliver up possession to the plaintiff Coles, which he on behalf of himself and the plaintiff Smith, accepted. Construing the first count of the declaration as we do, we think this plea also sets up a good defence by way of executed contract, according to the case of *Gore v. Wright (a)*.

The plaintiffs have replied to this plea, by traversing that it was agreed by and between the plaintiff Coles, for and on behalf of himself and the plaintiff Smith, and the defendant, that the defendant should be discharged from liability to pay any further rent, and that possession was accepted, in pursuance of the alleged agreement, in discharge of the defendant's liability, in manner and form, &c. To this replication the defendant has specially demurred, on the ground that it is double and multifarious, inasmuch as the plaintiffs have denied not only the agreement alleged, but also the acceptance of the possession of the chambers in pursuance thereof.

It is unnecessary for us to decide whether this is a sufficient cause of demurrer, or whether the plaintiffs are entitled by their replication to deny the whole of the

(a) 8 A. & E. 118 ; S. C. 3 N. & P. 243.

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matters alleged in the plea, as constituting a single point of defence; because we are of opinion that the replication is bad, for another cause, not specially assigned, but which we regard as an objection of substance, viz., that the traverse is too large, by reason of including the allegation in the plea of the agreement therein mentioned having been made by the plaintiff Coles for and on behalf of the plaintiff Smith, as well as of himself. The case of *Wallace v. Kelsall* (a), appears to us to prove that the plea would contain a good bar, without this allegation. If this be so, the traverse is bad, (and, in our opinion, bad on general demurrer,) if it would put the defendant, on the trial of the issue, under the necessity of proving the allegation, in order to obtain a verdict. And we have come to the conclusion that this would be the effect of the traverse, after considering the authorities relating to the point, the principal of which are cited and fully discussed in the judgment of the Court of Exchequer in the late case of *Lush v. Russell* (b); though the decision itself of that case does not at all govern the present point. Therefore, on this demurrer also, our judgment must be for the defendant.

The eighth plea is also addressed to the same sum of 84*l.*, and alleges, that, before it became due from the plaintiffs to Heale, the plaintiff Coles, with the sanction and authority of the plaintiff Smith, evicted the defendant from the chambers. The plaintiffs have replied, traversing that the plaintiff Coles evicted the defendant with the sanction and authority of the plaintiff Smith.

To this replication, the defendant has demurred; and it appears to us to be open to the same objection as the replication to the seventh plea, viz.: that the traverse is too large, by reason of including the immaterial allegation that the eviction was authorized by the plaintiff Smith. On this demurrer, therefore, our judgment must likewise be for the defendant.

(a) 7 M. & W. 264; S. C. 8 Dowl. 841.

(b) *Ante*, p. 369.

The eleventh plea is addressed to the second and third counts of the declaration, the former being for use and occupation, and the latter on an account stated; and it avers, that, after the causes of action accrued, and before action brought, the defendant was discharged by the order and adjudication of the Insolvent Debtors' Court. The plaintiffs have replied, as to so much of this plea as relates to the third count, that the cause of action accrued after the order and adjudication in the plea mentioned. To this replication, the defendant has demurred specially, on the ground of its amounting merely to an argumentative denial of the allegation in the plea, that the order and adjudication were made after the causes of action. And, as this is plainly a fatal objection to the replication, our judgment on this demurrer also must be for the defendant.

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Judgment for the Defendant.

ELY v. MOULE and Another.

December 6.

[In the Exchequer of Pleas.

Coram Parke, B., Alderson, B., Platt, B., and Martin, B.]

TRESPASS for breaking and entering the house of the plaintiff and taking his goods.

The defendant, Moule, pleaded: first, not guilty; secondly, that the goods were not the plaintiff's goods; thirdly, that no notice of action had been given; and, lastly, that the defendant had levied his plaint in the County Court of Worcestershire, holden at Droitwich, against the plaintiff, for the recovery of a debt of 18*l.* 13*s.* 6*d.*; that the plaintiff, having been duly sum-

It is not necessary to serve the judgment of a County Court before levying execution.

Where, therefore, the defendant in a plaint in the County Court neglects to appear, and judgment is

given in his absence, for payment of the debt and costs "forthwith," execution may be levied upon such judgment without service of it.

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moued, did not appear, whereupon the defendant recovered judgment for that amount, together with 3*l*. 18*s*. 6*d*. costs, which said sums were by the Court ordered to be paid “forthwith” to the clerk of the Court at his office at Droitwich; that the plaintiff, in disobedience of the said order, did not pay those sums to the clerk of the Court at his office in Droitwich forthwith; whereupon, and after default made in such payment, the clerk, at the request of the defendant, issued a fieri facias under the seal of the Court, as a warrant of execution to the high bailiff, thereby empowering him to levy on the goods of the plaintiff; by virtue of which, the high bailiff entered the house and took the goods of the plaintiff, and levied the said sum of money by distress and sale, &c. The plaintiff took issue on the first three issues; and to the fourth replied, admitting the matter of record averred in it, and traversing de injuriâ absque residuo causæ, &c., on which the defendant took issue. The other defendant, Tombs, who was clerk of the Droitwich County Court, pleaded similar pleas, on which the same issues arose.

At the trial, before *Williams*, J., at the last assizes for Worcester, it appeared that the plaintiff was duly summoned by Moule to the County Court at Droitwich, but did not appear; that the case was heard in his absence, and that the Judge of the Court made an order for payment, in the usual form, directing Ely to pay the amount of 18*l*. 13*s*. 6*d*., together with costs, “to the clerk of the Court at his office in Droitwich forthwith.” At the foot of this order was the following notice: “Attendance at the office from ten till four o’clock.” The bailiff of the Court called at about five o’clock on the same day at the residence of the plaintiff, about four miles from Droitwich, and demanded payment in pursuance of the order; and, on his refusing, served him with the order, and after shewing him a warrant of execution made under it, levied the amount upon his goods. Upon these facts, the first three issues were found for the plaintiff, with 30*l*. damages, and the

fourth for the defendant, with leave to the plaintiff to move to enter the verdict for him on that issue, upon the ground that the order ought to have been served before four o'clock. A rule having been obtained during last Term accordingly,

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Whateley and *Gray* shewed cause. The question raised in this case depends on what was the effect of the order made by the Judge of the County Court in the absence of the plaintiff; that is, whether that order is to be treated as a judgment, with all its incidents, or only as an order which would require to be served before execution could be levied under it. As to the plaintiff's absence, it is clear from the 9 & 10 Vict. c. 95, s. 80 (*a*), that the defendant must be taken for all purposes to be present at the hearing, and to be affected with notice of the judgment order, as if he had been actually present. Had he been present when this order was made, the execution would, beyond dispute, have been good; and his neglect to appear cannot place him in a better situation. Whether the order requires to be served depends upon the construction of 9 & 10 Vict. c. 95, s. 94 (*b*); and it is submitted that no previous demand of the amount is necessary under that section. The duty of making payment in compliance with the terms of the order is cast upon the defendant; and if he neglect to do so, execution may issue and be levied forthwith. Were

(*a*) Which enacts, that "if on the day so named in the summons, or at any continuation or adjournment of the Court or cause in which the summons has issued, the defendant shall not appear, or sufficiently excuse his absence, or shall neglect to answer when called in Court, the Judge, upon due proof of service of the summons, may proceed to the hearing or trial of the cause on the part of the plaintiff only, and the judgment

thereupon shall be as valid as if both parties had attended."

(*b*) Which enacts, that "whenever the Judge shall have made an order for the payment of money, the amount shall be recoverable, in case of default or failure of payment thereof forthwith, or at the time or times and in the manner thereby directed, by execution against the goods and chattels of the party against whom such order shall be made."

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it not so, the defendant might in every case, by absenting himself from the hearing, obtain the opportunity of removing his goods so as to defeat an execution. By the 42 Geo. 3, c. 90, a power was given to magistrates to make an order for the payment of servants' wages in certain cases; and by sect. 61 it was enacted, that "in case of refusal or non-payment of any sums so ordered to be paid by the space of twenty-one days next after such determination, such justice may and shall issue forth his warrant to levy the same by distress and sale," &c.; and an appeal is given to the sessions. In *Wootton v. Harvey* (a), it was held, that where twenty-one days had elapsed between the making of such an order before the appeal, and also twenty-one days after the appeal was dismissed and before the warrant issued, a magistrate had acted rightly in issuing an order for distress, without proof of any demand subsequent to the appeal.

Keating and *Huddleston*, in support of the rule. It need not be denied that the Judge of the County Court has power to make an order for immediate payment; but it is contended that when such an order is made, the defendant should have an opportunity given him of complying with the terms of it, having regard to the time when, and the person to whom, the money is ordered to be paid. Until the defendant has had an opportunity of complying with the order, it cannot be said that he has disobeyed it, or that any "default"—the word used in sect. 94—has been made. [*Alderson*, B.—Here that question does not seem to arise. It may be that, as payment is to be made at the clerk's office between ten and four o'clock, if the judgment were given after four o'clock, "forthwith" might be construed as meaning at ten next morning.] These orders are similar to those of justices, which are not complete until they are served; *Rex v. The*

(a) 6 East, 75.

Justices of Lancashire (a); *Gibbs v. Stead* (b). Even if this be a judgment, it ought to have been served. The 14th rule (c), made under sect. 78, for regulating the practice and proceedings of the County Court, clearly contemplates the service of judgments as well as of other proceedings. Moreover, the Judges who framed those rules have given a written form of judgment, and the whole proceedings in the County Court under the act shew that it never was intended to give to its oral judgments the same effect as those of a superior Court, but that they must be reduced into writing and served.

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PARKE, B.—The rule must be discharged. I should not have consented to the rule nisi being granted, but that it is of great importance that a question affecting the practice of the County Courts should be clearly defined and understood. I am of opinion that in the present case there was no occasion to serve the order. It is a judgment of the Court, of which all parties who are duly summoned must take notice, and part of that judgment is that the defendant should pay “forthwith.” Sect. 80 of the 9 & 10 Vict. c. 95, provides, that if the defendant does not appear, the hearing may proceed in his absence, and “the judgment thereupon shall be as valid as if both parties had attended.” The presence of the defendant is, therefore, constructive; and as the judgment in the present case was that the defendant should pay the debt and costs “forthwith,” and he has neglected to do so, execution properly issued under sect. 94, there having been a “default or failure.” But we

(a) 8 B. & C. 593; S. C. 2 M. & R. 519.

(b) 8 B. & C. 528; S. C. 2 M. & R. 547. See, however, *Reg. v. The Justices of Derbyshire*, 7 Q. B. 193.

(c) Which provides, that the preceding rules, except rule 11, “as to the mode of service of

summonses to appear to a plaint, shall apply to the service of all summonses, judgments, orders, notices, and process, whatsoever, issuing under the authority of the said act, except where otherwise directed by the said act, or any rule made under the authority thereof.”

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are told that the Judges by one of their rules, made under the powers of the act, have required that judgments and orders should be served. With respect to orders, they clearly must be served. If a Judge of a County Court makes an order varying the terms of a former judgment, it must be served like a rule of a superior Court; but as to judgments, as I can find no case in the statute where a judgment need be served, I think they are like the judgments of a superior Court, and require no service. It is possible that in framing the rules alluded to, the Judges considered that the Court might, in some cases, make an order to pay money within a certain time after service of the judgment. Here, however, that is not so; the order to pay forthwith is part of the judgment, and the defendant must take notice of it as if he had been present when it was made. The proceedings being regular, the rule must be discharged.

ALDERSON, B. — I am of the same opinion. Entertaining, as I do, great respect for those who framed the rules of practice of the County Court, I think the one referred to was made *ex abundanti cautela*, so as to meet every possible case which might happen; in order that if in any instance it were necessary to draw up and serve an order made by a Judge, such a case might be provided for. The rule is to be read, not as requiring that all judgments must be served, but as pointing out in what manner those judgments which do require service shall be served. I concur entirely with what has been said by my Brother *Parke*; the order in the present case was a judgment, and is to be treated as the judgment of a superior Court.

PLATT, B.—I do not think there was any necessity for serving this judgment or order, before levying execution under it. It is remarkable that throughout the act provision is made for the service of summonses and other proceedings, as *ex gr.*, in sect. 59, where the service of a summons to

appear to a plaint is provided for; and in sect. 122, under which the Court cannot proceed to give judgment against a tenant holding over, except "upon proof of service of the summons;" whereas there is nothing in the whole act requiring the service of judgments. In Schedule (D) also, which contains a table of fees to be taken by the officers of the Courts, a fee is given to the bailiff for "serving every summons, order, or subpoena;" but there is no mention of serving a judgment. I think the true rule is, that where an order of a County Court is in the nature of a rule of Court, it must be served; but that where it is a judgment it need not. If the plaintiff has sustained any injury it was by his own fault in not appearing when summoned. Having neglected to do so he must take the consequences.

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MARTIN, B.—I think that this was clearly a judgment, and that being so, it did not require to be served. If the order be in the nature of a rule absolute, or interlocutory order, service would be necessary; here, however, it is a judgment, and the very insertion in it of the word "forthwith," satisfies me that the Judge intended not to allow any time for payment. A debt arose as soon as the judgment was given; after which it was the duty of the debtor to be in readiness to pay his creditor, and no demand on the part of the creditor was necessary. If we were to hold the contrary, we should, by requiring service in all cases, be inflicting further costs on the defendants in these Courts, which is to be avoided if possible.

Rule discharged.



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November 25,
December 7.

In re an Arbitration,
Between FRANCIS BEAUMONT ELLISON and GEORGE
ELLISON,
and
WILLIAM ACKROYD and THOMAS ACKROYD.

[*Bail Court. Coram Patteson, J.*]

By an agreement referring certain disputes to two arbitrators, and upon failure to make an award within a specified time, then to an umpire, to be appointed by them, the costs of the reference, award, and umpirage were to be in the discretion of the arbitrators and umpire respectively. By agreement between the parties, the umpire sat with the arbitrators up to the time when their power to make the award expired, and afterwards the arbitrators sat with the umpire, and,

THIS was a rule to review the Master's taxation of costs in the above matter.

The following facts appeared upon the affidavits. By an agreement of reference made the 6th of August, 1849, between the above parties, after reciting that disputes had arisen concerning trespasses committed by the parties respectively in reference to the collieries of which they were respective owners, such disputes were referred to the award, &c. of J. A. and W. W.; "and in case the said arbitrators do not make their award within the time hereinafter mentioned, then to the umpirage of such person as the arbitrators shall indifferently choose for umpire." The costs of the agreement, "and of the reference, and award, and umpirage," to be "in the discretion of the said arbitrators and umpire respectively, who shall direct and award by and to whom, and in what manner, the same shall be paid." By a memorandum indorsed on the agreement of reference, and dated the 24th of October in the same year, the arbitrators, previously to their entering upon the reference, appointed J. W. as umpire. Before the reference was gone

being scientific persons, acted as his assessors, and assisted him in making his umpirage. The umpire made his award, and gave notice that it might be taken up "on payment of the costs of umpirage and award," and specified the amount, including charges for the attendance of the arbitrators. E. paid the fees and took up the award. The award directed that each party should pay their own costs of the reference, and that the "costs" "of the said umpirage, and of this my award," should be paid by A. to E. *Held*, on motion to review the taxation, that the charges for the attendance of the arbitrators were part of the costs of the umpirage which A. by the terms of the award was to pay.

into, it was arranged between the attorneys of the parties that the umpire should sit with the arbitrators to hear the evidence, so that, in the event of the latter not agreeing, it would not be necessary to go over the same evidence again before the umpire. The umpire, accordingly, sat during the whole reference, and when the time for the arbitrators to make their award had expired, it was further agreed that the two arbitrators, being persons of skill and knowledge and well acquainted with the working of collieries, should continue to sit with the umpire and assist him in taking the evidence,—which they accordingly did. The reference lasted for a considerable space of time; and it was shewn by the affidavits in opposition to the rule, that the arbitrators in fact acted as agents for the respective parties before the umpire, who was attended also by the attorneys on both sides. The umpire made his award, which, after finding that W. A. and T. A. were guilty of the trespasses, and that F. B. E. and G. E. were not guilty, and that the latter had sustained damage to the amount of 780*l.*, which the former were to pay, proceeded thus: “And I also award,” &c. “that the costs of the said in part recited agreement of the 6th of August, 1849, and also of the said umpirage, and of this my award, (such costs to be taxed by the proper officer in that behalf, if the said W. A. and T. A. choose to tax the same), shall be paid by the said W. A. and T. A.” to F. B. E. and G. E.; “and that each of them, the said F. B. E. and G. E., W. A. and T. A., shall pay their own costs of the reference (other than the costs of my said umpirage and this my award).” On the 1st of April, in the present year, Messrs. Ellison received a letter from the attorneys of the umpire, stating that he had made his award, which was ready to be delivered to either of the parties “on payment of the costs of umpirage and award, amounting to the sum of 370*l.* 7*s.*,—the particulars of which are as follows: Mr. W. W.’s” (the arbitrator appointed by Messrs. Ackroyd) “bill, 102*l.* 18*s.* 6*d.*; Mr. J. A.’s” (the arbitrator appointed by Messrs. Ellison)

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“bill, 107*l*. 2*s*.; Mr. J. W.’s” (the umpire) “bill, 132*l*. 3*s*.; our charges and counsel’s fees, 28*l*. 3*s*. 6*d*.; total, 370*l*. 7*s*.” The attorney of the Messrs. Ellison, on the same day, took up the award and paid the 370*l*. 7*s*. On the 5th of April, the umpire’s attorney paid the two arbitrators their respective bills. At the taxation before the Master, Messrs. Ellison claimed to be allowed the whole costs paid on taking up the award, as the “costs of the umpirage and award.” On the part of Messrs. Ackroyd, the allowance of any part of the two sums paid for the arbitrators’ charges was objected to, on the ground that they did not form any part of the costs of the umpirage, but were part of the costs of the reference. The Master entertained the objection, and refused to allow any part of the charges of the two arbitrators. The present rule was supported by an affidavit of the umpire stating that he intended to include in the costs of the umpirage, to be borne by Messrs. A., the charges of the arbitrators, and that he had been advised by counsel that, under the terms of his award, they were so included.

H. Hill shewed cause. The Master was right in disallowing the costs of the arbitrators. Where the arbitrators cannot agree, and it is left to the umpire to make the award, the latter cannot award a sum to be paid to the arbitrators for their services, which by their disagreement have become useless. [*Patteson*, J.—Where arbitrators disagree, and the award is made by an umpire, are they entitled to any fees?] Not under the award. It is like the case of a special jury, who, if they cannot agree and are discharged, are not entitled to any allowance. It cannot be contended that the umpire was bound to pay them anything; and if not, they were not costs of his umpirage and award. The words costs of the “award and umpirage” in the submission are to be read *reddendo singula singulis*,—costs of the “award,” if the arbitrators make it, and costs of the “umpirage,” if the umpire makes it. The manner in which the arbitrators acted in this case shews that, if

their charges were recoverable at all, it would be only as costs of the reference. [He referred to *Combes and Freshfield, Trustees of the Globe Insurance Company and Fearnley (a).*]

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Atherton, in support of the rule. The award must be so construed as to render it valid. By the terms of the submission, the umpire was bound to dispose of the costs “of the reference, and award, and umpirage.” The costs of the “umpirage, and of this my award,” must include whatever “their own costs of the reference” leaves uncovered. “Their own costs” points to costs incurred by each separately, as costs of attorneys, witnesses, &c. Those costs of reference which are common and incidental to the investigation are costs of the award or umpirage. A contrary construction would leave one class of costs undisposed of by the award. At any rate, some portion at least of the expenses of the arbitrators should be allowed. They sat with the umpire and assisted him in taking the evidence. They were persons of skill and knowledge in the matters referred, and the umpire was entitled, as soon as they had ceased to act as arbitrators and he took upon himself the burthen of the umpirage, to have their assistance and advice; and he might pay them a reasonable remuneration, and charge it as the expenses of his umpirage. The award would not have been delivered up unless these charges had been paid. As to the affidavits shewing that the arbitrators acted as agents, it is very inconvenient to have these facts brought forward, imputing a charge of misconduct to the arbitrators, after the time for setting aside the award has elapsed. Even if they were acting as agents, as each party is to bear their own costs of the reference, Messrs. Ellison are entitled to have the sum allowed which they have paid for the expenses of Ackroyd’s agents.

Cur. adv. vult.

(a) Exch. Hil. Term, 1850. Not reported. See *ante*, p. 342, and n. (b).

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PATTESON, J., delivered judgment.—This was a rule to review the Master's taxation, under the following circumstances. The parties had agreed to refer certain disputes to two arbitrators, and if they did not make their award within a specified time, then to the umpirage of such person as the arbitrators should appoint; the costs of the agreement, "and of the reference, and award, and umpirage," to be "in the discretion of the said arbitrators and umpire respectively, who shall direct and award by and to whom, and in what manner, the same should be paid." The arbitrators, before entering upon the reference, appointed an umpire; and it was agreed that he should sit with the arbitrators to hear the evidence, so that, in the event of their differing, he might decide the case without a rehearing. The arbitrators failed to make their award within the specified time, and it was further agreed that they should continue to sit with the umpire, acting as his assessors, until he had finished the case; for they were men of more science than he, and were well acquainted with the working of collieries,—concerning which the disputes arose,—and could, and did, assist him in the examination of scientific witnesses. It appears, however, that they acted, as is almost always the case under such circumstances with lay arbitrators, as advocates of the respective parties. The umpire made his award, and gave notice that it might be taken up "on payment of the costs of umpirage and award;" and he specified what those costs were, not only as to their total amount, but how he made up that amount, and he included in them the charges of the arbitrators. The award was taken up and the money paid by Messrs. Ellison, and it then appeared that he had directed that Messrs. Ackroyd should pay the costs of the "umpirage" and "award," and that the parties should bear their own costs of the reference.

Upon the taxation, the Master refused to allow any costs for the attendance of the arbitrators, being of opinion that

they were not costs of the umpirage, but costs of the reference, which, by the terms of the award, were to be borne by the parties respectively.

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They were clearly either costs of the reference or of the umpirage, over both of which, by the terms of the reference, the umpire had discretion. Perhaps technically and strictly speaking they were costs of the reference; but when the umpire says that the respective parties shall pay their own costs of the reference, he means, no doubt, that each party shall bear the expense to which he has been put. He cannot intend that the fees of persons, whose assistance he has had in making his award, are to be considered as costs of the reference.

The real question is, whether these costs can be considered as "costs of the umpirage." It is clear that the umpire intended they should be included in that description, for they are specified as part of the costs to be paid on taking up his umpirage. I think that, under all the circumstances, they may fairly be considered as part of the costs of umpirage, which, by the terms of the award, Messrs. Ackroyd are ordered to pay.

The Master's decision was therefore erroneous. I do not say that he was bound to allow the precise sums charged; but he must review his taxation upon this point.

Rule absolute.



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November 30. **DODGSON, Public Officer of the Bank of Whitehaven,
v. BELL.**

[In the Exchequer Chamber, in Error from the Court of
Exchequer.

Coram *Patteson, J., Coleridge, J., Wightman, J., Erle, J.,
Williams, J., and Talfourd, J.*]

By a deed of settlement constituting a joint stock banking company, it was provided, that before the husband of a shareholder became a member of the company, he should take certain steps therein specified. A woman who was a shareholder of the company before her marriage, continued after her marriage and without her husband's knowledge, to receive dividends and pay calls in her maiden name upon her shares, which remained registered in that name ;

SCIRE FACIAS (dated 16th of June, 1849,) against the defendant as a member of the Newcastle-upon-Tyne Joint Stock Banking Company, upon a judgment recovered against that company by the plaintiff as Public Officer of the Bank of Whitehaven, for 13,477*l.* 3*s.* 1*d.*

Plea. That the defendant was not a member of the company when the scire facias issued, modo et formâ, &c. ; upon which issue was joined.

At the trial before *Patteson, J.*, at Newcastle, it was agreed that the verdict should be entered under the direction of the learned Judge for the defendant ; that a bill of exceptions should be tendered to his ruling, and also that the following facts should be admitted. The defendant on the 23rd of September, 1843, married Mary Stephenson, who at the time of her marriage and afterwards, was a shareholder in the Newcastle-upon-Tyne Joint Stock Banking Company, in respect of twenty shares. She received dividends upon the shares up to the beginning of the year 1846, and gave receipts for such dividends both before and since her marriage in the name of Mary Stephenson.

and she was so described in the list of shareholders returned to the Stamp Office. Her husband knew that she was a shareholder, but did not take the steps required by the deed of settlement to become a shareholder in respect of her shares, or do any other act respecting them.

Held, that execution could not be sued out against the husband upon a sci. fa. under the 7 Geo. 4, c. 46, s. 13, as a member for the time being.

The calls were paid by her in her maiden name, and that name was always returned to the Stamp Office in the yearly list of shareholders. The defendant never executed the deed of copartnership, nor did his name ever appear in the books of the Bank, or in the shareholders' register; he knew that his wife was a shareholder when he married her, but did not know of her paying the calls or receiving the dividends. The material provisions of the deed of settlement of the Newcastle-upon-Tyne Joint Stock Banking Company, so far as they bear upon the present question, were in substance as follows.

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By sect. 27, it was provided, that before the husband of any female shareholder should sell or assign any shares vested in him in such capacity, or should become a member of the company in respect of such shares, or receive any dividend in respect of the same, he should leave for inspection with the company the certificate of the marriage of the person in whose right he claimed such shares, or should otherwise prove his title thereto to the satisfaction of the directors.

Sect. 28 provided, that the husband of a female shareholder should not be a member of the company in respect of the shares vested in him, as husband; but might either dispose of them, or at his option become a member of the company in respect of them, on complying with the provision in the next section.

Sect. 29 provided, that the husband of any shareholder, who should be desirous of becoming a member of the company in respect of the shares so vested in him, might give notice to the company of his desire, and upon stating certain particulars, and otherwise complying with the provisions of the deed of settlement, he might be admitted a member of the company in respect of such shares, and have the same transferred into his own name, and should be personally charged with the duties and liabilities incident to their ownership.

By sect. 30 it was provided, that the husband of any

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shareholder who should not so elect, &c., should be entitled to receive any dividend due on the shares so vested in him before his title thereto accrued, but not such as became due on them after his title accrued; and that till some person became a member of the company in respect of the shares, such dividends should remain suspended.

Sect. 31 provided, that in case any person in whom any shares by original subscription or by purchase, bequest, marriage, representation or other mode of acquisition or devolution, became vested, and who had not executed the deed of settlement, should for six months after notice neglect or refuse to execute the same, the directors might declare the shares so vested in the person so neglecting or refusing, and all benefit thereof to be forfeited to the other shareholders, and the same should be forfeited accordingly.

By sect. 32 it was provided that the husband of any shareholder, who should by such notice signify his desire to become a member of the company in respect of the shares vested in him in such capacity, and should not, at the time of the said shares becoming vested in him, be a member of the company in respect of any other shares, should be considered as to all duties, obligations, claims and demands upon or against him, in respect of such shares, a member of the company from the time of the same shares being so transferred to, or so becoming vested in him; but as to all profits and rights, privileges and benefits, to arise from them, not until he should have executed the deed of settlement or some deed of accession thereto.

Unthank, for the plaintiff in error. The question which the Court has to decide is, whether, upon the facts as admitted, the defendant was a member of the company when the *scire facias* issued. This depends upon the construction of sects. 12 and 13 of the Banking Act, 7 Geo. 4, c. 46 (a). The word "member," in sect. 13,

(a) Sect. 12 enacts, that "all and every judgment and judgments, decree or decrees which shall at any time after the passing of this act be had or recovered, or entered up as aforesaid, in any

must mean a person having a community of interest in, and sharing the profits of, the bank. The defendant, by his marriage with a shareholder, and receiving dividends through her, became such a "member." It is true, that in order to arrive at this conclusion, the case of *Ness v. Angas* (a), which was recognised in *Ness v. Armstrong* (b), must be overruled; but *Ness v. Angas*, it is submitted, cannot be supported. There the wife of the defendant had purchased, with his consent, but with the proceeds of her separate estate, shares in a joint stock banking company, and was registered as a shareholder in her own name. The defendant had received dividends

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action, suit or proceedings in law or equity, against any public officer of any such copartnership, shall have the like effect and operation upon and against the property of such copartnership, and upon and against the property of every such member thereof as aforesaid, as if such judgment or judgments had been recovered or obtained against such copartnership." The section then goes on to provide, that notwithstanding the bankruptcy, insolvency, or stopping payment of the public officer in his individual capacity, the effects of members shall still be liable.

Sect. 13 enacts, "that execution upon any judgment in any action obtained against any public officer for the time being of any such corporation or copartnership carrying on the business of banking under the provisions of this act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such corporation or copartnership; and that in case any such execution against

any member or members for the time being of any such corporation or copartnership, shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being, to issue execution against any person or persons who was or were a member or members of such corporation or copartnership at the time when the contract or contracts or engagement or engagements in which such judgment may have been obtained was or were entered into or become a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained." The section then provides that no such execution may issue without leave of the Court in which the judgment was obtained.

(a) 3 Exch. 805; S. C. 6 D. & L. 645.

(b) 4 Exch. 21; S. C. 7 D. & L. 73.

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and signed receipts as his wife's agent; he also attended a meeting at which none but shareholders were entitled to be present. The Court held that the defendant was not a "member" within 7 Geo. 4, c. 46, s. 13. The Chief Baron, in giving judgment, seems to have overlooked the case of *Steward v. Greaves* (a). The preamble of 7 Geo. 4, c. 46, states that the Bank of England had consented to relinquish its exclusive privilege, provided, among other things, that the "individuals composing" the "copartnerships" thereby established should "be liable to and responsible for the due payment of all bills and notes issued by" such copartnerships. The words "individuals composing," and the word "member," which is used throughout the act, must mean a partner in the sense which is given to those words at common law; nor can their meaning be affected, or the responsibility of members be lessened as against third parties, by any provisions contained in the deed of settlement. [*Patteson, J.*—An ordinary partnership can only be controlled by the deed of settlement. Would the defendant be entitled to a share in the profits under the company's deed?] By sect. 27 of the company's deed of settlement, the shares of Mary Stephenson are vested in the defendant upon his marriage with her. [*Erle, J.*—Your proposition is, that marriage makes the husband a partner against his consent.] In *Ness v. Angas* (b), *Rolfe, B.*, appears to have founded his opinion on the fact, that the defendant did not hold himself out to be a partner; that is not, however, the ground upon which it is sought to establish the defendant's liability in this case, but upon his being a member or partner who receives, or is entitled to receive, profits. The act should be construed in favour of those who are seeking to obtain payment of their debts from members. Under the Joint Stock Companies Winding-up Act, the proceedings under which afford an

(a) 10 M. & W. 711; S. C. 2 Dowl. 485, N. S.

(b) 3 Exch. 805; S. C. 6 D. & L. 645.

analogy to the present case, it has been held, that the husband of a female shareholder should be put on the list of contributories, although he omitted to comply with certain formalities required by the deed of copartnership; *In re The North of England Joint Stock Banking Company, Burlinson's case* (a); even though he has never received any dividends; *In re The North of England Joint Stock Banking Company, Sadler's case* (b). [He referred also to *In re The Vale of Neath and South Wales Brewery Joint Stock Company, Ex parte Kluht* (c), and *In re The North of England Joint Stock Banking Company, Ex parte Gouthwaite* (d).]

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Knowles (*H. Hill* with him) was not called upon.

PATTESON, J.—The question in this case arises upon an issue joined on a writ of scire facias, which alleges that the defendant was a member of the Newcastle-upon-Tyne Joint Stock Banking Company. We have now to decide whether he was so within the meaning of the 7 Geo. 4, c. 46, s. 13. (His Lordship having read that section, continued):—At the trial admissions were made on both sides, and a bill of exceptions was tendered to my ruling, with the purpose, doubtless, of reviewing the decisions of *Ness v. Angas*, and *Ness v. Armstrong* (e). In the present case, the husband never did any act to make himself a member; his wife received dividends and paid calls on the shares, and her maiden name was on the register; but her husband, the defendant, was not aware of those facts, and never interfered in any way, nor took any steps to have them transferred to his own name. In *Ness v. Angas*, the facts were still stronger to shew that the defendant was liable, as he had actually received dividends and signed receipts as the agent of his wife; whereas in this case he did not know

(a) 3 De Gex & Smale, 18.

(d) *Ib.* 393.

(b) *Ib.* 361.

(e) 4 Exch. 21; S. C. 7 D. &

(c) 19 Law Journ. Chanc. 385. L. 73.

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that she received any dividends. It has been sought, however, to make the present defendant liable in his marital right; but although all the personal property of the wife is vested in her husband on their marriage, we must look at the deed of copartnership, and, by sects. 27 and 28, we find that a husband does not become a partner by the mere fact of marriage; and sects. 31 and 32 require him to do certain acts in order to become a member. The provisions contained in those sections are clear; and if we are to give them any meaning, they shew that, until the husband has done those acts, he is not a member as regards the company, as was pointed out in the judgment of the Court in *Ness v. Angas (a)*. Then, is he a member as regards other people? It is admitted that he did not hold himself out as such; there are no facts, indeed, to that effect, nor could there well be in the case of a joint stock company. We must therefore again refer to the deed of copartnership, which, as I said before, shews that he is not a member. As to the decisions under the Winding-up Act which have been cited, they do not seem to be reconcilable; but in any case they do not apply here, as in order to fix a defendant by scire facias under the 7 Geo. 4, c. 46,—the act we are now bound by,—it is necessary to shew that he is actually a member; whereas the facts admitted clearly shew he is not. The verdict for the defendant was therefore right, and the judgment for him must be affirmed.

PER CURIAM.

Judgment affirmed.

(a) 3 Exch. 805; S. C. 6 D. & L. 645.

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1. The Court will not order an affidavit which is not shewn to be scandalous or irrelevant, to be taken off the file, merely because it cannot, upon some technical ground, such as a defect in the jurat, be read in the cause in which it is filed. *The Duke of Brunswick v. Sloman and Others*, 247

2. The Court set aside an attachment against an attorney for not paying over certain moneys received in his professional character, where the party obtaining it, had described herself in her affidavit as a *widow* of the name of *A. C.*, whereas she was at that time a *married woman* of the name of *A. H.*; although it did not appear that the false name and description were used for any fraudulent purpose. *Regina v. Carttar*, 386

3. The omission of a deponent's addition in an affidavit, in pursuance of Reg. Gen., 1111. Term, 2 Wm. 4, r. 5, is an irregularity merely, and the party seeking to take advantage of it, must come to the Court within a reasonable time.

A reasonable time in such cases dates from the time when the party complaining of the irregularity had the means of knowing it; although, in point of fact, he did not know of it till afterwards. *Seymour v. Maddox*, 543

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1. On appeal against a poor rate, the respondents objected, that in respect of one of the grounds of appeal, it was necessary, under the

41 Geo. 3, c. 23, s. 6, that notice of the appeal should have been given to the persons therein named. The appellants denied that the ground of appeal came within that section. The sessions, however, decided that a notice was necessary to be given under the statute. The appellants then offered to abandon that ground of appeal, and proceed with others in respect of which no notice at all was required. The sessions refused to permit them to do so, and dismissed the appeal: *Held*, on motion for a mandamus, that the sessions had power to decide upon whether they would permit the appellants to abandon that particular ground of appeal, and proceed with the others; and that having done so, this Court would not interfere to review their decision.

Where the sessions have put a particular construction upon a ground of appeal, if it will bear that construction, this Court will not review their decision. *Regina v. The Justices of Cambridgeshire*, 47

2. The word "immediately," in the 6 Geo. 4, c. 129, s. 12, which enacts that the execution of every judgment appealed from shall be suspended, "in case the person so convicted shall immediately enter into recognizances," means "promptly and expeditiously," having regard to all the circumstances of the particular case.

The prisoner was convicted on a Thursday of an offence against the 6 Geo. 4, c. 129. The attorney who attended on his behalf, left the Court before sentence pronounced, and the prisoner was taken at once to Stafford gaol. His friends instructed an attorney, who lived at Manchester, to take the necessary steps on his behalf. The justices met in petty sessions at some distance from the place where the prisoner was confined. Nothing was done on the Friday; but on the

Saturday the prisoner was prepared to give notice of appeal and enter into recognizances, but the justices did not sit on that day. On the Monday he offered to enter into recognizances before the justices, which they refused to receive: *Held*, that the application was not too late, and that the justices ought to have received the recognizances. *Regina on the Information of William Weston v. William Aston*, 491

3. The 11 & 12 Vict. c. 31, s. 9, which enacts, "that no appeal shall be allowed against any order of removal, if notice of such appeal be not given *as required by law*, within the space of," &c., does not require that the statement of the grounds of appeal should be given within the prescribed time. *Regina v. The Recorder of Derby*, 657

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1. On a reference of all matters in difference between the parties, the umpire ordered G. to pay to M., on a balance of accounts, a certain sum, and that "mutual releases of all claims and demands whatsoever," should be executed, and in case of any dispute arising as to the form of such releases, that they should be settled by J. P.

Quære, on motion to set aside the award, whether the direction that they should be settled by J. P. was bad? but *held* that that part might be separated from the rest of the award, which was good. *Held* also, that the umpire had power to award mutual releases of all claims and demands existing at the time of, and referred by, the submission; although there was no express power to that effect contained in the submission; and that the award of releases as to any other claims, &c., was void: but that even if he had no such power, that portion of the award was separable from the rest, which might stand as good.

M. was engaged to build a ship, of which G. was part owner and ship's husband. Disputes having arisen between them, "all matters in difference" between them were referred to arbitration. When the parties were before the umpire, G. offered to pay certain bills due for materials for the ship, and for which M. was primarily liable, and requested the arbitrator to deduct the amount from the sum to be found as owing from him to M. The umpire accordingly deducted the amount, and made his award for the balance, and ordered that G. should remain solely liable

for the payment of these bills, and should give, if required, a bond of indemnity in respect of them to M. *Held*, on motion to set aside the award, that G. could not, after having requested the umpire to make the deduction, object that it was not a matter in difference, and that he had no authority. *Held* also, that the award of the bond of indemnity, if bad, was clearly separable from the rest, and might be rejected as surplusage.

Semble, that the umpire had power to order a bond of indemnity to be given.

On a rule to set aside an award, any part of the award be bad, but can be clearly separated from the rest, and treated as surplusage, the rule will be discharged generally. *In re an Arbitration between Theophilus Bartlett Goddard and John Mansfield*, 2.

2. Where upon a submission to arbitration, an agreement was entered into between the parties, that a clerk should be specially employed to take down in writing the evidence given before the arbitrators, and that the evidence so taken should, in the event of the arbitrators not agreeing, be sent under their seals to the umpire, who might thereupon in his discretion make his umpirage, without rehearing the evidence: and the umpire accordingly, at the hearing, refused to re-examine the witnesses, though requested to do so by one of the parties. *Held* no ground for setting aside the award. *In re an Arbitration between George Firth and Joseph Howlett*, 6.

3. An agreement of reference of a cause, in which the costs of the cause, reference, and award were to abide the event, contained a clause authorizing either party to make it a rule of Court. The arbitrator found that the plaintiff was entitled to recover a less sum than 20*l*. *Held*, that it might be made a rule of Court with

out being first stamped. *Lloyd v. Mansell*, 130

4. A cause was referred by order of nisi prius, to the award of an arbitrator, to whom "the cause, and also the subject-matter of the cause, and the rights of the parties in relation thereto, as well at law as in equity, were referred, to order and determine what he should think fit to be done by either of them respecting the matters in dispute." The arbitrator found by his award, that under a certain agreement entered into by the parties, the plaintiffs were entitled to receive two sums of money from the defendant; and directed that upon proof that certain payments had been made by them, the defendant should pay to the plaintiffs those two sums. *Held* a good award, as being sufficiently certain and final. *Miller and Another v. De Burgh*, 177

5. Where an arbitrator finds the amount of the costs of an award, it is not necessary that they should be taxed by the Master, previously to the Court ordering them to be paid. *Dixie v. Alexandre*, 338

6. An order of reference directed that the costs of the award should be in the discretion of the arbitrator. The arbitrator awarded that the costs of the award should be borne by the defendant, "which said costs" "I do assess at the sum of 39*l.* 17*s.* 4*d.*" It appeared that part of that sum was the amount of charges of an attorney, whom the arbitrator, who was a layman, had employed to assist him in taking the evidence and drawing up the award. The plaintiff took up the award, and afterwards demanded payment of the 39*l.* 17*s.* 4*d.* of the defendant, who refused to pay it. On motion for an attachment against the defendant, *Held*, that the arbitrator had power in the first instance to name the sum to be paid for the costs of the award; and that if the defendant did not proceed with due diligence to procure a taxation, and

insist on the necessity of it, he could not set up the want of taxation as a ground for opposing an attachment for non-payment. *Held* also, that as the arbitrator was a layman, his employment of an attorney was reasonable; but that, at all events, as the defendant had not objected during the reference to the employment, he must be taken to have assented to it.

Held also, that the payment of the costs of the award by the plaintiff to the arbitrator sufficiently appeared, although not sworn to on the affidavits, from a correspondence between the parties, in which the payment was assumed on both sides, and not disputed by the defendant, and also from the fact that the plaintiff had taken up the award. *Threlfall v. Fanshawe*, 340

7. By a rule of reference, the action, which was brought by one weir proprietor against another, for disturbance of a weir, was referred to an arbitrator, who was to have full power to determine, and also to define and for ever set at rest all disputes, quarrels, and controversies, touching all manner of rights of "depths of weirs" and other water privileges. The arbitrator by his award, after disposing of the action, recited that differences had arisen between the parties touching the depth of the defendant's weir, and the depth at which he was entitled to keep the same; and awarded that the defendant was "entitled to keep and maintain his said weir of the depth of fourteen inches." *Held* sufficiently certain.

The award further directed, that "for the purpose of defining, denoting, and perpetuating the limit of the said depth," &c., that within one month, &c., "such durable marks and erections be placed on the land adjoining to the said weir, as D. B., of," &c., "may direct, as being the best adapted for so defining, denoting, and perpetuating the limit of the said depth of fourteen inches." *Held*

bad, as being a delegation of the discretion vested in him by the reference, and *Semble*, that this portion of the award could not be separated from the rest, and be rejected as surplusage.

The rule of reference contained a clause "that in the event of any application being made to this Court on the subject of the said award," the Court should have power to remit the matter back to the arbitrator for re-consideration: *Held*, that a rule for payment of money under the award was "an application" "on the subject of the said award" within the above clause, and empowered the Court to remit the matters back to the arbitrator. *Johnson v. Latham*, 348

8. A verdict was taken for the plaintiff for the damages named in the declaration, subject to a reference. At the first meeting before the arbitrator, the defendant objected that the order of reference was not drawn up according to the terms agreed upon; inasmuch as it did not authorize the arbitrator to direct a verdict to be entered for him on an issue of payment, but only to reduce the damages; and he applied to have the hearing postponed till an application could be made to the Judge to amend the order. The plaintiff contended that the arbitrator had full authority to direct a verdict for the defendant upon that issue as it stood, and the arbitrator himself was of that opinion. The arbitration was accordingly proceeded with upon that view, and an award was made directing a verdict to be entered for the defendant on the issue of payment: *Held*, on motion to set aside the *postea* and judgment, that it was not competent for the plaintiff to object to the above misconstruction (if any) of the order of reference. *Gravatt v. Attwood*, 392

9. Where fresh evidence was discovered since the making of an

award, which must have been known to, but withheld by, the party whose favour the award was made, the Court ordered the matter to be remitted to the arbitrator for reconsideration, under a clause to that effect in the agreement of reference. *In re an Arbitration between John Burnand and John Wainwright*

10. Where a cause and all matters in difference are referred by an order of nisi prius, which orders that the costs of the cause shall abide the event, and the costs of the reference and award, to be taxed, shall be at the discretion of the arbitrator, judgment cannot be signed, nor a Master's allocatur for the costs obtained, until the end of the Term next after the making of the award. *Jones v. Ives*, 6

11. Where a cause and all matters in difference are referred, an award reciting the order of reference, and purporting to be made "de pmissis," is final, although it does not in express terms, notice a matter brought before the arbitrator. *Crowther v. Harrison*, 7

12. Where a cause alone is referred, and the costs of the cause and of the reference are to abide the event, the costs of the reference and costs of the cause, and follow the event. *Deere v. Kirkhouse*, 7

13. By an agreement referring certain disputes to two arbitrators and upon failure to make an award within a specified time, then to an umpire, to be appointed by the parties, the costs of the reference, award and umpirage were to be in the discretion of the arbitrators and umpire respectively. By agreement between the parties, the umpire sat with the arbitrators up to the time when the power to make the award expired, and afterwards the arbitrators sat with the umpire, and being scientific persons, acted as his assessors, and assisted him in making his umpirage. The umpire made his award, and

gave notice that it might be taken up "on payment of the costs of umpirage and award," and specified the amount, including charges for the attendance of the arbitrators. E. paid the fees and took up the award. The award directed that each party should pay their own costs of the reference, and that the "costs of the said umpirage and of this my award," should be paid by A. to E. *Held*, on motion to review the taxation, that the charges for the attendance of the arbitrators were part of the costs of the umpirage which A. by the terms of the award was to pay. *In re an Arbitration between Ellison and Ackroyd*, 806

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Upon an application to the Court to rescind a Judge's order for holding the defendant to bail, under the 3rd section of the 1 & 2 Vict. c. 110, no other affidavits can, in general, be used than those which were before the Judge when he made the order.

Therefore, fresh affidavits cannot be used, on an application of this kind, to shew either that the plaintiff has no cause of action, or that the defendant was about to quit the country.

But fresh affidavits may be used on an application under the 6th section to discharge the defendant out of custody, although a previous application has been made to a Judge at Chambers under that section.

Where the affidavit on which the order to hold to bail is granted, discloses a cause of action for unliqui-

dated damages only, it should specify the amount of damage sustained by the plaintiff. *Semble*.

Where, however, a Judge had granted an order to hold to bail upon an affidavit which did not contain such statement, the Court refused to rescind the Judge's order, or to discharge the defendant out of custody; as the Judge might have been satisfied upon the facts stated in the affidavit that the plaintiff had sustained damage to the amount for which he ordered the defendant to be held to bail.

An affidavit to hold to bail in an action for criminal conversation with the plaintiff's wife, stated that she had been taken away from the plaintiff about two years ago, and that the plaintiff had only recently discovered that she had been living ever since with the defendant in adultery; but omitted any positive averment that she was the plaintiff's wife when she was taken away, or that the defendant had committed adultery with her: *Held* sufficient.

Where an order has been made to hold a defendant to bail, it is not necessary that the affidavit upon which it was made should shew that a writ of summons has been first issued; as the Court will intend that the fact was proved to the satisfaction of the Judge. *Bullock v. James Jenkins, sued as Henry Bentinck*, 645

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TRIAL AT BAR.

1. The Court will not, in the ex-

ercise of its summary jurisdiction prevent an attorney, who is the defendant in an action at the suit of his client, suing as administrator, from pleading a plea not directly touching the merits, such as the plea of the Statute of Limitations; even though the accrual of the statute may have been owing to his neglect in not advising the plaintiff to take out letters of administration earlier.

Action by the administratrix of the estate of D. for money had and received by D. from the defendant, who was an attorney, and who had used the name of D. in his lifetime. Plea, that the Statute of Limitations; replication, that D. was beyond the sea when the cause of action accrued, and did not return to England before his death, and that until the grant of administration, there was no one to sue, and that the action was brought within three days after administration granted. Rejoinder, that before the death of D. and at the time of the death of D. the plaintiff Ellen was his wife, and might, within a reasonable time after his death, have obtained administration of his effects; but that she refused more than seven years to elapse after the death of D. before she took out letters of administration: *Hovell v. Tristram*, on motion to refer it to one of the Masters to say what should be done in the action, that if there were circumstances which at law prevented the defendant, being an attorney, from setting up the defence of the Statute of Limitations, in an action on a money demand at the suit of his client, the proper way for the plaintiff to avail herself of them was by a surrejoinder, and not by calling on the Court, on affidavit, to interpose its summary jurisdiction, to prevent the defendant from pleading the plea of the Statute of Limitations. *In re John Hovell Tristram, Gent, one, &c.*

2. The 91st section of the Courts' Act—which enacts that no person, except an attorney, shall recover any sum for acting on beh-

of any other person in the County Courts; and that no attorney shall have or recover "therefore" any sum where the debt or damage does not exceed 40s., or shall have or recover more than 10s. for his fees and costs, where the debt or damage does not exceed 5*l.*, or more than 15s. in any other case—does not prevent an attorney from recovering from his client remuneration beyond the amounts therein mentioned, for services rendered by him out of Court in respect of the subject-matter of the plaint, and before its commencement. *Keighley v. Goodman*, 204

3. The 9 & 10 Vict. c. 95, s. 91, does not limit to the sums therein mentioned, the remuneration which an attorney may recover from his client, in respect of a suit in the County Court. *In re Toby, Gent., one, &c.*, 426

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Where an attorney has omitted to take out his certificate for more than a year before the stat. 6 & 7 Vict. c. 73, he need not apply for re-admission, but for an order in the usual form under sect. 25, on the registrar to renew his certificate. *Ex parte James Howard*, 710

ATTORNEY (LIEN OF).

A cause and all matters in difference having been referred to an arbitrator (the costs of the action to abide the event of the award), he directed that a verdict should be entered for the defendant in the cause, and found that 300*l.* were due from defendant to plaintiff in respect of the matters in difference; he also directed that that sum should be paid by defendant to plaintiff at a certain time and place, at which

same time and place he ordered the plaintiff to pay the defendant his costs of the action. The plaintiff having become bankrupt, the defendant paid to the plaintiff's attorneys the difference between the sum which he was ordered to pay, and that which he was to receive.

The Court refused, upon an application by the plaintiff's attorneys, to give effect to their lien by ordering the defendant to pay them the residue.

Pending the arbitration, the plaintiff assigned to his attorneys the debt due to him from the defendant. Whether the attorneys, upon such assignment, lost their lien, *quære*. *Dunn v. West*, 608

ATTORNEY (NAME OF).

1. An attorney who, without royal license, or any formal authority for the change, has assumed another name from that on the roll, for a specified reason, may have the roll altered to the assumed name, if it appear to the Court that such name has been taken *bonâ fide* and without fraudulent intention. *Ex parte William Daggett*, 1

2. Same point. *Ex parte Thomas James*, 4

3. Upon an attorney's changing his name, the Court of Exchequer refused to direct the Master to alter the name on the roll of the Court; but directed him to make a memorandum in the margin of the roll opposite to the applicant's name, stating that he is now known by the name of —, and that the same has been done by rule of Court. *Ex parte Dearden*, 666

ATTORNEY (NOTICE OF APPEAL SIGNED BY).

See REMOVAL, (ORDER OF), 2.

AUDITA QUERELA.

In *audita querela*, the defendant being absent and keeping out of the

way to avoid service, the Court refused to grant a rule to shew cause why service of the writ of venire facias and summons to appear, at the last known place of abode of the defendant, should not be good service. *Williams and Others v. Roberts*, 381

AWARD.

See ARBITRATION.
COMMONS' INCLOSURE ACT.
LANDS CLAUSES CONSOLIDATION
ACT (REFERENCE UNDER).
PRACTICE, 1.

BAIL.

See APPEAL, 2.

Recognizances to prosecute an indictment removed by certiorari into the Queen's Bench, under the 5 & 6 Wm. & M. c. 11, were estreated into the Exchequer. The principal had gone through the Insolvent Debtors' Court, and was in extreme poverty. The Court ordered proceedings against him to be stayed, but refused to interfere as to the bail. *The Queen v. Thornton*, 192

BAIL (AFFIDAVIT TO HOLD TO).

See ARREST, JUDGE'S ORDER TO,
(UNDER 1 & 2 VICT. c. 110).

BAILIFF.

See PLEA, 7.

BANKING COMPANY.

See JOINT STOCK COMPANIES WIND-
ING-UP ACT, 2, 3.
SET-OFF (PLEA OF).
SUGGESTION.

A joint stock company, constituted under the 7 Geo. 4, c. 46, cannot sue the subscribers for calls in the names of the persons with whom the covenant to pay them, contained in

the deed of settlement, was entered into; but must bring the action in the name of their public officer under sect. 9 of the statute;—the provision in that section that all actions "shall and lawfully may" be brought in the name of the public officer being obligatory, and not permissive only. *Chapman and Another v. Milvain*, 20

BANKRUPT.

See ATTORNEY (LIEN OF).
BANKRUPTCY LAW CONSOLIDA-
TION ACT.
HUSBAND AND WIFE.
PLEA, 4.

BANKRUPTCY LAW CONSOLIDATION ACT.

See DATE OF WRIT OF SUMMONS
(EVIDENCE OF).
PLEA, 4.
WARRANT (OBEDIENCE TO).

1. The 224th section of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), enacts, that every deed of arrangement entered into by a trader with six-sevenths of his creditors, shall be binding on all his creditors; and the 225th provides that no such deed shall be binding on any non-executing creditor "until after the expiration of three ("calendar," see sect. 276) "months from the time at which such creditor shall have had notice from such trader" of the deed.

To a declaration upon a bill of exchange, the defendants pleaded in bar of the whole action that after the bill became due, a deed of arrangement was entered into between them and six-sevenths of their creditors, under the 224th section; that the plaintiff, to wit, on the 1st of November, 1847, had notice from them of the deed, and that three months elapsed from the notice before the commencement of the suit.

Held, upon motion for judgment non obstante veredicto, that the plea was bad, for not stating that the notice was given after the act came into operation.

Quære, whether it was not also bad for not stating that such notice had been given three calendar months, &c. *Marsh v. Higgins and Another*, 253

2. A Judge's order given by consent by a trader not afterwards becoming bankrupt, is valid as against him, although not filed in pursuance of the 12 & 13 Vict. c. 106, s. 137.

Semble, that that section makes the Judge's order "null and void" only in the event of the trader becoming bankrupt; but even then, not as against him. *Bryan v. Child and Farmer*, 429

3. After issue joined and before trial, defendant, a trader, petitioned the Court of Bankruptcy for protection under the 12 & 13 Vict. c. 106, s. 211. At the time when he filed his account the cause had been tried, and a verdict found against him for 22*l.*, but judgment had not been signed. He described the debt in his account as "W. S. Disputed, estimated at 50*l.*, has got judgment for 22*l.* and costs." The proposal made by the defendant at the first private sitting was to pay "7*s.* 6*d.* in the pound," with a satisfactory guarantee for the due payment of the same." The assent at the second private sitting was "to accept 7*s.* 6*d.* in the pound upon the amount of our respective claims," &c., "the amount being guaranteed by" S. S. and H. S. The defendant obtained a protection from arrest; but having been subsequently taken upon a ca. sa. founded upon the judgment in the above action:

Held, upon motion for his discharge from custody, first, that the debt was sufficiently stated in the account.

Secondly, that the protection applied to the costs as well as to the debt itself.

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Thirdly, that although the form of the agreement with the creditors was imperfect,—the proposal and the assent not being in the same terms, and the guarantee not being to all the creditors, but only to those who signed the assent,—the protection was valid. *Southgate v. Saunders*, 553

4. The plaintiff recovered judgment against the defendant in the Court of Exchequer. Afterwards, on the 1st of January, the defendant, being in custody at the suit of W., petitioned the Insolvent Court, and inserted in his schedule the plaintiff's judgment debt and costs. On the 12th, the plaintiff lodged a detainer against the defendant upon the judgment. On the 25th, he withdrew the detainer, and petitioned the Court of Bankruptcy for adjudication of bankruptcy against the defendant, who was, on the same day, adjudged bankrupt. On the following day he was discharged by the Insolvent Court. On the 23rd of July, the Court of Bankruptcy granted a certificate under the 257th section of the 12 & 13 Vict. c. 106, certifying that the plaintiff was a judgment creditor for 71*l.* 7*s.*, which was the amount of the judgment, minus the costs. The defendant having been taken in execution upon a ca. sa. issued out of this Court upon that certificate. *Held*, upon motion for his discharge,

First, that the defendant's discharge from arrest upon the judgment did not preclude the plaintiff from arresting him upon the certificate.

Secondly, that the defendant was not protected from such arrest by the 1 & 2 Vict. c. 110, s. 90.

Whether a judgment creditor who has taken his debtor in execution is a good petitioning creditor to support a commission of bankruptcy, *quære*.

But whether he is or not, *Held*,

Thirdly, that where no steps have

H H H

L. M. & P.

been taken to supersede the proceedings in bankruptcy, the commissioner's certificate under sect. 257 must be treated as valid.

Fourthly, that the 257th section of the 12 & 13 Vict. c. 106, applies to creditors who have obtained judgment before proof as well as to those who have not.

Fifthly, that the 40th section of 1 & 2 Vict. c. 110, keeps alive the proceedings in the Insolvent Court only for the purpose of reaching the future estate of a bankrupt who obtains his certificate, but has no operation when the bankrupt does not obtain his certificate.

Sixthly, that the 12 & 13 Vict. c. 106, transfers all questions as to the bankrupt's discharge to the Court of Bankruptcy. *Walker v. Edmondson*, 772

5. The defendant's costs under the 12 & 13 Vict. c. 106, s. 86, are to be deducted from the debt or damages recovered by the plaintiff, and not from the debt or damages, and the plaintiff's costs added together. *Deere v. Kirkhouse*, 783

BAR (TRIAL AT).

See TRIAL AT BAR.

BASTARDY (ORDER IN).

1. The caption of an order, adjudicating a party to be the father of a bastard child, stated that it was made "at a petty session of her Majesty's justices of the peace for the said riding," &c., "holden," &c., "before us, the Rev. F. S., clerk, and T. P. Esq. her Majesty's justices of the peace for the said riding, and a majority of the justices now present." The order was signed by F. S. and T. P.: *Held*, on motion to quash the order which had been brought up by certiorari, that it must be taken in effect to state that F. S. and T. P. were justices of the peace, and a majority of those present.

The order, which was made the 22nd of September, 1849, recited that a summons had been issued to appear on the 15th day of September instant, "and whereas the C. B. having been duly served with the said summons within forty days from the said 15th day of September instant, from which day the hearing of this case hath been adjourned, and now appearing in pursuance thereof by G. H. his attorney, and the F. A. P." (the mother) "having applied to us:" *Held*, that it was no defect that the order did not state that the summons was served before the 15th day of September, or that the parties appeared on that day, as to authorize an adjournment to the 22nd; as it was stated that the defendant was duly served with the summons, and that he appeared with attorney at the hearing on the 22nd. *Held* also, that it sufficiently appeared that the application for the order was made within forty days of the service of the summons.

The order recited that the justices had heard "all the evidence on oath tendered on behalf of the said C. B." *Held* sufficient. *Ex parte Boynton*,

2. A party summoned under the 7 & 8 Vict. c. 101, may give notice of appeal, under sect. 4, within twenty-four hours after the order is verbally pronounced by the justices, although it is not formally drawn up and signed by them till afterwards.

A verbal notice of appeal, under that section, given to the mother by the attorney of the father, in his presence and hearing, and at his request is sufficient. *Regina v. Justices of Huntingdonshire*.

3. The jurisdiction of the petty sessions to make an order of affiliation and maintenance under the 7 & 8 Vict. c. 101, s. 3, where the putative father does not appear before them, only attaches "on proof" that the summons was left at his "last" place of abode.

BREACH.

The word "last" in that section means the present place of abode, if the party have any; the last which he had, if he has ceased to have any.

Although the justices have jurisdiction to make an order "on proof" that the summons has been duly served; yet, if it can be afterwards shewn to this Court that in point of fact the summons was not duly served, this Court will grant a certiorari to bring up the order into this Court for the purpose of being quashed.

An order of affiliation, bearing date the 4th of December, and made in the absence of the putative father, recited, "whereas the said R. J., having been duly served with the said summons within forty days from this day, to wit, on the 8th day of November last, and not appearing in pursuance thereof;" but omitted the words in the directions to the form given in the 8 & 9 Vict. c. 10, Schedule, No. 8, "and six days at least before this day, as is now proved before us:" *Semble*, that the order was bad. *Ex parte Rice Jones*, 357

BILL OF EXCHANGE.

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BISHOP.

See PLEA, 1.

BONA FIDES.

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COMMONS INCLOSURE ACT.
PRACTICE 1.
PROSECUTION 2.
RULE OF COURT (UNDER
12 & 13 VICT. C. 45, s. 18).

1. The Court will not entertain an application for a certiorari to remove a plaint from the County Court under the 9 & 10 VICT. c. 95, s. 90; it being the proper subject of an application to a Judge at Chambers. *In re a Plaint in the County Court of Norfolk, between Robertson and Another and Womack*, 490

2. Where an application was made to remove an indictment by certiorari into this Court by one of several defendants, the Court granted it upon his entering into recognizances to pay the costs, not only if he, but if either of the other defendants were convicted. *Regina, on the Prosecution of Dimdale, v. Foulkes and Others*, 720

CHANCERY.

SEE PETTY BAG OFFICE.

CHANGE OF NAME.

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COMMONS INCLOSURE ACT

CHANGE OF PUBLIC OFFICE

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SEE VENUE

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CLERK IN PRIVY COUNCIL OFFICE

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SEE SERVICE OF RULE TO COMPUTE

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SEE PAPER PLAINTIFF, 2.

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COMMISSIONER TO TAKE AFFIDAVITS (DESCRIPTION OF).

SEE JURAT, 3.

COMMITMENT.

SEE COUNTY COURT, 1, 2, 3, 7, 8.

COMMONS INCLOSURE ACT

Where the determination of a assistant inclosure commissioner has been removed into this Court by certiorari, under the 8 & 9 VICT. c. 118, s. 44, the Court will grant a feigned issue, where the party applying for it is really interested in the

question and dissatisfied with the determination; although the affidavits in support of the application do not shew that any further evidence can be adduced than was or might have been given before the assistant commissioner. *Regina v. Stephen Kelcey*, 499

COMPANIES CLAUSES CONSOLIDATION ACT.

See DECLARATION, 2.
EXECUTION, 1, 2.

1. Where a bond given by a railway company under the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16) has been signed in accordance with sect. 6, the proper party to sue on it is the assignee, not the original obligee.

Where such an assignment is pleaded, an averment that the money for which the bond was given was borrowed "in pursuance and exercise of the powers vested in the company under and by virtue of their act," (which incorporated the general act), is sufficient, without alleging that a general meeting had been held and an order made, as is required by sect. 38. *Vertue v. The East Anglian Railway Company*, 302

2. By the act incorporating the Caledonian Railway Company, six miles of which are in England, and the rest in Scotland, the English Companies Clauses Consolidation Act (8 & 9 Vict. c. 16) is incorporated, so far as is necessary for carrying into effect the English portion of the line. The company's principal office was in Edinburgh, and their only office in England was at Carlisle, which was used only for receiving passengers and goods

Held, that a service of a writ of summons, in an action of debt, on the secretary of the company while attending a meeting in London, was good. *Wilson v. The Caledonian Railway Company*, 731

CONDITION PRECEDENT.

See LANDS CLAUSES CONSOLIDATION ACT (REFERENCE UNDER), 2.

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— OF DECLARATION.

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— OF GROUND OF APPEAL.

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— “THEREFORE.”

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— “WAS AND STILL IS.”

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— “WHEREBY”—“WHEREUPON.”

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LANDS CLAUSES CONSOLIDATION ACT (REFERENCE UNDER), 1, 2.

REMOVAL (ORDER OF), 1.

TITHE COMMUTATION ACT, (COSTS OF INQUISITION UNDER).

1. A declaration contained two counts for an inquiry to the reversion: the first for damages to the surface of land; the second for damages to the foundation of a house. The defendant pleaded, first, not guilty to both counts; secondly, no reversion as to both counts; thirdly, a justification to the first count under a mining lease, to which there was a replication, and a demurrer, on which judgment was given for the defendant; fourthly, the Statute of Limitations to both counts; and fifthly, a plea to the second count, upon which the jury were, by consent discharged from giving a verdict. There was also a new assignment, and a plea of not guilty to it.

On the trial the verdict was on not guilty as to part of the first count for the plaintiff, with 140*l.* contingent damages; as to the residue of the first count, and as to the second, for the defendant; on the plea of no reversion, and as to the plea of the Statute of Limitations as to both counts, for the plaintiff; as to the new assignment, the verdict was for the defendant.

Held first, that the plaintiff was not entitled to the costs of the trial under the Statute of Gloucester, as he could not have judgment for the damages assessed. Secondly, that he was entitled, under 4 Ann. c. 16, to his costs as to the second count, and that part of the first on which he had succeeded under the issues of no reversion under the Statute of Limitations; and that those costs should not be confined to the mere costs of the pleadings, but should include a portion of the expenses of

briefs and witnesses. *Howell v. Rodbard*, 547

2. Where a plaintiff succeeds upon all the issues of fact, but fails upon a demurrer going to the whole cause of action, he is entitled, under the 4 Ann. c. 16, s. 5, to the costs of the issues of fact.

The declaration contained five counts, to which the defendant pleaded sixteen pleas. To one of these, which was to the whole declaration, the plaintiff demurred, and judgment was given against him. Upon the other fifteen pleas issue was joined, and a verdict was found for the plaintiff upon all the issues. *Held*, that the plaintiff was entitled, under the Statute of Anne, to the costs of those issues. *Callander v. Howard*, 755

3. The plaintiff succeeded at the trial on a single issue, which entitled him to a verdict, with nominal damages. The defendant succeeded on all the other issues. On taxation of costs, the Master allowed the defendant the costs of the special jury obtained by the plaintiff, on the ground that the plaintiff could not have obtained a special jury if the issue on which he succeeded had been the only one to be tried; and the fees paid to counsel with the briefs, on the ground that they were moderate, and such as would have been allowed, if the issue on which the plaintiff had succeeded had not been to be tried. The Court refused to order the Master to review his taxation. *Fazakerley v. Rogerson*, 747

COSTS (OF THE CAUSE).

See ARBITRATION, 12.

COSTS (CERTIFICATE UNDER 43 ELIZ. c. 6).

Where a Judge has granted a certificate to deprive the plaintiff of costs under the 43 Eliz. c. 6, after judgment signed and execution issued, the certificate, although inope-

rative, is not void; and the Court will give effect to it under particular circumstances, by setting aside the judgment and execution, upon payment of costs. *Lyons v. Hyman*, 601

COSTS (CERTIFICATE UNDER 4 ANN. c. 16).

A Judge may grant a certificate under the 4 Ann. c. 16, s. 5, upon an ex parte application.

It is no objection to such a certificate that it was granted after the taxation had commenced, the plaintiff having notice that his right to tax the costs was disputed. *Cobbett v. Sir G. Grey and Another*, 383

COSTS (OF THE DAY).

See PAUPER PLAINTIFF, 2.

1. At the trial, a variance being discovered, the record was withdrawn, and leave to amend granted under 3 & 4 Wm. 4, c. 42, s. 23. The order was drawn up by consent, and no mention was made of the costs. *Held*, that the plaintiff, for whose benefit the amendment was made, must pay the costs of the day. *Skinner v. The London, Brighton, and South Coast Railway Company*, 189

2. The plaintiff having entered his cause for trial at the assizes, it was called on the first day as undefended. Plaintiff's witness, a clerk of defendant, being absent, the plaintiff asked that he should be called on his subpoena, which was done, but he did not appear. The plaintiff then withdrew the record, on the representation of the Judge's clerk that it might be re-entered before twelve o'clock. He accordingly offered to re-enter it before that time, but the defendant had, in the mean time, entered a ne recipiatur, and the Judge held that the record could not be entered, it being after ten o'clock. The plaintiff offered either to try then, or that the cause should stand last on the list, if the defendant

would consent; but the defendant refused to do so.

The defendant having moved for the costs of the day, *Held*, that he was not entitled to them, it being by his own default that the cause was not tried. *Pope v. Fleming*, 272

COSTS (SECURITY FOR).

1. The Court required a plaintiff who had taken the benefit of the Insolvent Act, and who sued as trustee for one also in insolvent circumstances, to give further security for costs, than that of the person for whose benefit he sued. *Mais v. McNamara*, 296

2. A Judge's order, directing "that the plaintiff do forthwith give security for costs, no stay of proceedings in the mean time, the plaintiff's attorney hereby undertaking to find such security," does not bind the plaintiff or his attorney to give security, unless he proceed with the action.

A rule, therefore, for an attachment against the attorney for not giving security, was discharged, where it appeared that no step had been taken in the action. *Hill v. Fletcher*, 518

COSTS, SUGGESTION TO DEPRIVE PLAINTIFF OF (FORM OF RULE).

1. A rule nisi to enter a suggestion to deprive plaintiff of costs under the County Courts' Act, stated as the ground for the suggestion, that the verdict found for the plaintiff was for a sum less than 20*l.*, and for which a plaint might have been entered in the County Court. Whether such a rule be bad on the face of it where the action is in tort, *quære*. *Hand v. Daniels*, 420

COSTS (SUGGESTION TO DEPRIVE PLAINTIFF OF).

See STAY OF PROCEEDINGS.

1. Where upon a motion to enter

a suggestion to deprive a plaintiff of costs, under the County Courts' Act (9 & 10 Vict. c. 95), the fact relied upon by the defendant as bringing the case within the 129th section, is that the plaintiff and the defendant reside within twenty miles of each other, which is contradicted by the affidavits on the part of the plaintiff. The Court will, nevertheless, permit the suggestion to be entered, as the plaintiff is not concluded by it, but may traverse and try the fact. *Noloth v. Crook*, 37

2. Where on a motion to enter a suggestion under the County Courts' Act, to deprive the plaintiff of costs, on the ground that the place where the contract was entered into, was within the jurisdiction of a County Court within which the defendant resided, the defendant alone swore to a conversation, in the course of which he alleged the contract to have been made, without shewing that any other person was present who could depose to the fact; and the plaintiff denied the contract having been then made, and alleged that it was entered into at a different time and place: the Court refused to permit a suggestion to be entered. *Caterer v. Dean*, 38

3. On a motion to enter a suggestion to deprive the plaintiff of costs, under the County Courts' Act (9 & 10 Vict. c. 95, s. 129), the defendant's affidavit stated that the plaintiff recovered in an action of debt for money lent, and on an account stated, "a verdict for 10*l.*, and no more, on an I. O. U.," "and that the cause of action wholly arose" within the jurisdiction of the County Court within which the defendant dwelt.

The affidavits in answer were made by the plaintiff and his wife, and stated that the verdict was recovered "in respect of an item of 10*l.* for money lent," and they shewed that the sum of 10*l.* had been lent to the defendant out of the jurisdiction:

Held, that the suggestion must be entered, as it was quite consistent with the plaintiff's affidavits that the I. O. U., which was a material part of the cause of action, and which for aught that appeared was the plaintiff's sole evidence, was given within the jurisdiction, although the money was lent out of it. *Mills v. Best*, 43

4. On a motion to enter a suggestion to deprive the plaintiff of costs under the County Courts' Act (9 & 10 Vict. c. 95), where the action was brought by an administratrix for a debt due to the intestate, it is not necessary that the affidavit in support of the motion should negative that the intestate, as well as the administratrix, was an officer of the County Court.

Where the plaintiff has signed judgment in the book in the Master's office, but has not proceeded to complete it by taxing his costs, the defendant is not bound to move to set aside the judgment, before applying to the Court for leave to enter a suggestion to deprive the plaintiff of costs under the County Courts' Act. *Robieson, Administratrix, &c. v. Rees*, 69

5. A cause was tried by the undersheriff on the 7th of June, when the plaintiff obtained a verdict for less than 20*l*. On the 11th of June, judgment was regularly signed, costs taxed, and a fi. fa. sued out, which was executed shortly afterwards. On the same 11th of June, the defendant obtained a rule nisi to enter a suggestion to deprive the plaintiff of costs, which was made absolute in the Michaelmas Term following. Upon the motion of the defendant, in Hilary Term, 1850, the Court set aside the judgment and subsequent proceedings. *Read v. Blayney*, 106

6. A person who is not shewn to be connected with, or to have any means of knowledge concerning a cause, may make an affidavit for a rule to enter a suggestion to deprive

the plaintiff of costs. *Walker v. Furnell*, 127

7. The Court refused to permit a suggestion to be entered under the 9 & 10 Vict. c. 95, s. 129, on an affidavit which stated that at the time the action was brought, the defendant *carried on his business* within the jurisdiction of the Southwark County Court; and that the plaintiff did not dwell more than twenty miles from the defendant; but dwelt within twenty miles of the defendant; on the ground that it did not shew distinctly that the defendant dwelt within twenty miles from where the plaintiff dwelt. *Duck v. Barton*, 201

8. The affidavit in support of a suggestion to deprive the plaintiff of costs under the County Courts' Act, was made by a party of the same Christian and surname as the defendant, and stated the necessary facts to bring the case within the 128th section; but it nowhere expressly stated that the deponent was the defendant in the action: *Held* sufficient, if a person of ordinary sense, reading it candidly, could not doubt that they were one and the same person.

The affidavit in support of a suggestion stated "that the residence of this deponent was at the commencement of this suit, and still is, within the jurisdiction of the said County Court, that no officer of the said County Court was or is a party to this action:" *Held* a sufficient averment that no officer was a party, at the time of the commencement of the action. *Nind and Another v. William Jones*, 275

9. In an affidavit on which is grounded a motion to enter a suggestion to deprive the plaintiff of costs under the County Courts' Act, it is sufficient to state that the "cause of action" arose within the jurisdiction, without stating specifically what constitutes the cause of action.

Where the affidavits are contradictory as to the fact of the cause of

action having arisen within the jurisdiction, the Court will not entertain the question on motion, but will leave the parties to go to trial upon the suggestion. *Broad v. Carey*, 319

10. Where the plaintiff took out a summons to try the cause before the sheriff, which the defendant opposed, and an order was made dismissing the summons, upon the defendant's consenting that in the event of the plaintiff obtaining a verdict, his costs should be taxed upon the higher scale; and a verdict passed for the plaintiff for less than 20*l.*: *Held*, that this Court would not permit the defendant to enter a suggestion to deprive the plaintiff of costs, under the County Courts' Act (9 & 10 Vict. c. 95, s. 129). *Gosling v. Conder, the Younger*, 320

11. Assumpsit against the drawer of a bill of exchange, to which the only plea was a traverse of the drawing. On motion to enter a suggestion to deprive the plaintiff of costs under the County Courts' Act, *Held*, that notice of dishonour having been given by the plaintiff within the jurisdiction of a County Court, the cause of action "in a material point" arose within that jurisdiction.

On a motion to enter a suggestion to deprive a plaintiff of costs under the County Courts' Act, on the ground that the cause of action arose, in a material point, within the jurisdiction of a County Court within which the defendant dwells, it is immaterial whether the plaintiff knows that fact or not. *Heath v. Long*, 333

12. An affidavit in support of a rule for entering a suggestion to deprive the plaintiff of costs under the 9 & 10 Vict. c. 95, stated that plaintiff dwelt and still dwells in K. Street, within twenty miles of defendant, who dwelt and still dwells in P. Street.

Held insufficient, for not shewing that the residences were within twenty miles of each other. *Kirby v. Hickson*, 364

13. Where an action had been brought in a superior Court against husband and wife to recover a sum under 20*l.*, for money paid for the wife before marriage, on an application to deprive the plaintiff of costs under the County Courts' Act, an affidavit, stating only that the husband resided within the jurisdiction of the County Court at the time of the action being brought, was held insufficient. *Parry v. Davies and Wife*, 379

14. A clerk in the Privy Council Office, whose duties are performed at that office, does not "carry on his business" there, within sect. 60 of the County Courts' Act, (9 & 10 Vict. c. 95). *Glennie v. Delmar*, 402

15. The affidavit in support of a rule for a suggestion to deprive plaintiff of costs under the County Courts' Act, stated, that at the time of the commencement of the action, plaintiff dwelt at A., within one mile of B., the residence of defendant; *Held* insufficient, because it did not shew that the place described as the defendant's residence was his residence at the time of the commencement of the action.

Where the Court discharge such a rule by reason of the insufficiency of the affidavit in support of it, the defendant will not be permitted to renew his application. *Hand v. Daniels*, 420

16. An affidavit in support of a suggestion under the County Courts' Act, to deprive the plaintiff of costs, simply stated that the action was "founded on contract;" that "the debt claimed herein" was less than 20*l.*; and that "the cause of action did arise in a material point within the jurisdiction" of the County Court. It contained the other usual statements necessary to bring the case within the 129th section: *Held* sufficient to entitle the defendant to enter a suggestion, the plaintiff making no affidavit in answer. *Montgomery and Another v. Broggreff*, 507

17. A verdict having been recovered at the Spring assizes for a cause of action which might have been the subject of a plaint in a County Court, the plaintiff signed judgment on the 25th of April for the amount of the verdict, leaving a blank for costs. On the 6th of June, notice to tax the costs was served on the defendant, and on the following day the costs were taxed, final judgment signed, and execution issued. On the 10th of June, the defendant obtained a rule nisi to set aside the judgment and execution (if any), and to enter a suggestion to deprive the plaintiff of costs under the County Courts' Act: *Held*, that the motion to enter the suggestion was not too late, but would only be granted upon payment of the cost of signing the judgment and issuing the execution. *Bugg v. Scott*, 538

18. An affidavit to enter a suggestion to deprive the plaintiff of costs, under the County Courts' Act, (9 & 10 Vict. c. 95, s. 129), which states, that the plaintiff, at the commencement of the action, did not dwell more than twenty miles "from the defendant," is bad, for not saying "from the defendant's residence."

Such an affidavit should follow the intention, and not the words of the act. *Room v. Cottam*, 729

19. Where a debt or demand exceeding 20*l.* is sued for in a superior Court, and is reduced below that sum by payments, the defendant is entitled to enter a suggestion to deprive the plaintiff of costs, under the County Courts' Act, 9 & 10 Vict. c. 95, s. 129. *Turner v. Barry*, 744

COUNSEL, (FEES TO).

See Costs, 3.

COUNT.

See MISJOINDER.

COUNTY COURT.

See ATTORNEY, 2, 3.

See CERTIORARI, 1.

COSTS (SUGGESTION TO DEPRIVE PLAINTIFF OF).

PROHIBITION.

1. A warrant of commitment made under the 99th and 102nd sections of the County Courts' Act (9 & 10 Vict. c. 95), stated that the party was examined, and that he "did not attend" at the Court at the appointed time, "or allege any sufficient excuse for not attending;" and that it appeared to the Court that he had obtained credit from the plaintiff under false pretences;" and "had made a gift, delivery, or transfer of property, with intent to defraud his creditors;" and required the gaoler to keep him in prison "for the term of forty days from the arrest under this warrant, or until he shall be sooner discharged by due course of law." *Held*, on motion for a habeas corpus, that the warrant of commitment being partly in the nature of a civil proceeding, was not bad for not stating that the examination was "upon oath," or for shewing two offences; or for uncertainty in the description of the offence; or for requiring him to be kept in prison for forty days, or until he should be sooner discharged by due course of law.

On the 11th of January, 1849, a judgment was recovered against a party in the County Court for a debt which he was ordered to pay forthwith. On the 12th of the same month he was arrested for debt, and on the 15th he petitioned the Insolvent Court. On the 17th a vesting order was made, and he filed his schedule, in which the debt recovered by the plaintiff in the County Court was inserted. On the 18th, the judgment debt not then having been paid, the County Court made an order for his commitment under the 99th section of the County Courts' Act. On the 2nd of April, the Insolvent Court ordered his discharge as to all debts existing on the 17th

of January, and inserted in his schedule. On the 11th of January, 1850, a warrant of commitment, founded on the order of the County Court of the 18th of January, 1849, was issued, under which he was taken unto custody. *Semble*, that the discharge by the Insolvent Court freed the defendant from all liability in respect of the debt recovered by the judgment of the County Court. *Quære*, whether the defendant was not bound to apply to the Judge of the County Court in the first instance for his discharge? *Ex parte Pardy*, 16

2. A warrant of commitment under the 99th and 102nd sections of the County Courts' Act,—following substantially the form settled by the Judges,—stated that the plaintiff had recovered judgment in the County Court; that the defendant personally appeared to the *said* summons, and neglected to pay; that he was then and there examined touching his estate; that the Judge found that he had obtained credit under false pretences, and had made a gift, delivery, or transfer of his property, with intent to defraud his creditors; that the defendant asked for an adjournment, which was granted; that he did not appear upon the day of adjournment, and that the Judge then found that he had obtained credit, &c., (as on the first occasion), and ordered him to be committed for forty days.

The order of commitment, which was brought up, stated the offence in the same way as in the warrant.

Held, first, that the personal appearance "to the said summons" referred to the appearance at the hearing;

And secondly, that the order and warrant were not bad for stating the offence in the disjunctive. *Ex parte Pardy*, 118

3. To a declaration for trespass and false imprisonment against the high bailiff of a County Court and the governor of the gaol, the defend-

ants justified under a warrant under the seal of the County Court, and directed to them, whereby, after reciting that the plaintiff had wilfully insulted the Judge during his sitting, and that thereupon the Judge had ordered the plaintiff to be taken into custody and detained until the rising of the Court, it "therefore" required the defendants to arrest the plaintiff, and imprison him for seven days.

Held, First, that the warrant was not bad for uncertainty in specifying the cause of commitment;

Secondly, nor for omitting to describe the nature of the insult. And

Thirdly, that the recital the plaintiff had insulted the Judge was a sufficient adjudication of the offence.

Semble, that the County Courts although Courts of record, are inferior Courts. *Levy v. Moylan and Others*, 307

4. Whether the County Courts have jurisdiction in cases of detinue, *quære*.

If they have, whether they can, like the superior Courts, award a delivery of the chattel and a distringas to seize the lands of the defendant, or whether they can only give damages for the detention, *quære*.

If they can only give damages, whether the plaintiff in an action of detinue in the superior Courts obtaining a verdict for less than 5*l.*, can be deprived of his costs under the County Courts' Act, *quære*. *Hand v. Daniels*, 420

5. Where some items of an account are for goods sold, and others for money lent, the plaintiff may bring two separate plaints in the County Court; the items being of a different character, and not constituting one "cause of action," within the meaning of the 9 & 10 Vict. c. 95, s. 63. *In the matter of Brunskill v. Powell*, 550

See tit. "*Prohibition*," (4).

6. To a declaration in debt the defendant pleaded, by way of estoppel, that he, the defendant, had sued

the plaintiff in the County Court for a debt, and the plaintiff had then attempted to establish as a set-off, the claim for which he now sued, and that judgment was given against the now plaintiff as to that set-off. The plaintiff replied that he had not given any notice of his intention to rely on the set-off, in accordance with sect. 76 of the County Courts' Act, 9 & 10 Vict. c. 95, and rule 17, and that defendant did not consent to his setting off the debt.

Held, on demurrer, that the replication was a good answer to the plea of estoppel, since it shewed that there had been no decision in the County Court by which the plaintiff was concluded. *Stanton v. Styles*, 575

7 An order of the Judge of a County Court, made upon a summons after judgment, under the 9 & 10 Vict. c. 95, s. 99, ordering that the defendant shall pay an instalment of a judgment debt upon a future day, or, in default, be committed, is invalid. *Abley v. Dale*, 626

8. It is no objection to a warrant upon an order of commitment made by a County Court Judge under the 98th section of the 9 & 10 Vict. c. 95, that the warrant was not issued until, six months after the date of the order, although it does not appear that any previous warrant has been issued. *Ex parte O'Neill*, 787

COURT (INFERIOR).

See COUNTY COURT.

RULE OF COURT (MAKING ORDER OF INFERIOR COURT).

COVENANT.

See DECLARATION, 8.

PLEA, 7.

CREDITOR (JUDGMENT).

See BANKRUPTCY LAW CONSOLIDATION ACT, 4.

CREDITORS (ARRANGEMENT WITH).

See BANKRUPTCY LAW CONSOLIDATION ACT, 3.
PLEA, 4.

DAMAGES.

See ARREST, JUDGE'S ORDER TO, (UNDER 1 & 2 VICT. c. 110).
BANKRUPTCY LAW CONSOLIDATION ACT, 5.
ESCAPE.

DATE.

See COUNTY COURT, 8.
DECLARATION, 6.
JURAT, 3.
PLEA, 4.

DATE OF WRIT OF SUMMONS (EVIDENCE OF).

Upon an application by the defendant under the 12 & 13 Vict. c. 106, s. 86, for his costs, the date of the commencement of the action is sufficiently shewn by the statement of the writ of summons in the issue delivered by the plaintiff, without any express averment to that effect upon the affidavits. *Deere v. Kirkhouse*, 783

DE INJURIA.

See PLEA, 2.
REPLICATION, 1.

"DE PRÆMISSIS."

See ARBITRATION, 11.

DEATH.

See PRACTICE, 5.
SUGGESTION.

DEATH OF ONE OF SEVERAL PLAINTIFFS.

Where one of several co-plaintiffs dies, the surviving plaintiffs must, if they desire to bring that fact to the knowledge of the Court in any proceeding in the cause, enter a suggestion of it upon the roll.

Where, therefore, the defendant obtained a rule for judgment as in case of a nonsuit, the Court refused to discharge it, except upon the usual peremptory undertaking to try; notwithstanding the production of

an affidavit stating the death of one of the plaintiffs subsequently to the delivery of the declaration.

That affidavit was intituled in the names of all the plaintiffs, both deceased and surviving. *Semble*, per *Maule, J.*, that it was wrongly intituled. *Larchin and Others v. Buckle*, 740

DEBT.

See BANKRUPTCY LAW CONSOLIDATION ACT, 5.

Debt lies against the drawer of a banker's cheque by the payee to whom it has been delivered by the drawer.

A declaration stating that the defendant was summoned to answer the plaintiff in an action of debt, contained a count on a cheque alleging that the defendant, in consideration of the premises, *promised* the plaintiff to pay him the amount of the said draft or order on request, and contained also counts for goods sold and delivered, and on an account stated. The declaration concluded with the general breach, "Whereby and by reason of the non-payment of the said several moneys, an action hath accrued," &c. On motion in arrest of judgment, *Held*, a good declaration in debt, as the allegation of a *promise* to pay the cheque might be rejected as surplusage. *Simkins v. Potheary*, 249

DEBT (OF PETITIONING CREDITOR).

See BANKRUPTCY LAW CONSOLIDATION ACT, 4.

DECLARATION.

See DEBT.

FERRY (CASE FOR DISTURBANCE OF).

JUDGMENT IN DEBT ON BOND (WHERE SEVERAL ISSUES).

MISJOINDER.

PLEA, 6.

USURY.

1. A declaration in case by a re-

versioner, after stating that he had a right of way, for the tenants of his close, over the close of the defendant, averred that the defendant wrongfully "locked, chained, shut and fastened" a gate across the way, "by means of which said premises" the plaintiff was injured.

Held, upon motion in arrest of judgment, that the declaration disclosed a good cause of action.

Held also, that the allegation that "by means of" the premises the plaintiff was injured, was a substantive allegation of fact, and not an inference of law resulting from facts antecedently stated.

A matter of fact may be well stated by an averment commencing with the term "whereby" or "whereupon." *Kidgell v. Moor*, 131

2. The form of declaration given by sect. 26 of 8 & 9 Vict. c. 16, (the Companies Clauses Consolidation Act), is not applicable to an action against the executors of a shareholder for calls made during his lifetime. *The Birkenhead, Lancashire and Cheshire Junction Railway Company v. Cotesworth and Others*, 244

3. In debt for railway calls, the declaration stated "that the defendant, at the time of the making of the calls, *was and still is*, the holder of divers, to wit, thirty-nine shares in the said company, and before the commencement of this suit, to wit, &c., *was and still is*, indebted to the said company, &c. *Held*, on special demurrer, that the declaration was good, although it did not follow the form given by sect. 26 of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, which enacts, that it "shall be sufficient" "to declare that defendant *is* the holder," &c., "and *is* indebted," &c.;—all except what is required by the statute being only surplusage. *The East Lancashire Railway Company v. Croxton*, 298

4. In an action on the case for maliciously suing out a *capias*, and

causing the plaintiff to be arrested under 1 & 2 Vict. c. 110, an allegation that the defendant falsely, maliciously, and unjustly procured an order from a Judge, by *falsely maliciously representing to the Judge that the plaintiff was justly and truly indebted to the defendant in the sum of, &c., by means of a certain false affidavit then shewn and uttered by the defendant before the Judge*, is good on special demurrer; and the declaration need not set out the false statement or charge by which the Judge was induced to make the order; nor need it allege that the facts on which the defendant relied in his statement before the Judge, were false to his knowledge, or that he had not reasonable or probable cause to suppose them to be. *Ross v. Norman*, 409

5. A bond was conditioned to be void if A. B., a poor rate collector, should, when requested by the guardians, pay to such banker, or other person as they should appoint, all sums which he should collect when they amounted to 20*l.*; or if, in the event of his not paying according to the direction of the guardians, either of his sureties should, within twenty-one days after notice, pay any sums which he should not have paid according to such direction.

A declaration upon the bond against one of the sureties averred that A. B., after the bond, and before being directed to pay, collected by virtue of his office sums amounting to a large sum, to wit, 470*l.*; and that although a reasonable time for payment had elapsed before action, and before the twenty-one days' notice to the sureties, yet he made default. It then assigned two breaches, the first of which was non-payment by the defendant twenty-one days after notice of the default of A. B.; and the second, that while A. B. was collector he received divers sums, amounting, to wit, to 500*l.*, in respect of rates, and the same re-

mained in his hands, and although a reasonable time had elapsed, he had not paid the same, though often requested, to the guardians or their treasurer, or any person appointed by them to receive the same.

Held, upon special demurrer, first, that the declaration was not bad for omitting to aver that legal rates were made and delivered to A. B., or to set forth the names of the persons from whom they were collected; and, secondly, that the second breach was not a good breach of either branch of the condition. *Kingsford v. Dutton*, 479

6. The writ was dated the 23rd of August. The declaration—after stating that defendant had agreed, on the 17th of July, to appear and perform for three months *as an equestrian on the stage and in the ring*, in all performances to be produced at A. or elsewhere under the direction of plaintiff, in such parts as plaintiff should require, and should attend rehearsals when required—alleged, that although plaintiff had an establishment at P. under his direction *for equestrian performances*, and although during the subsistence of the said agreement, and before the expiration of the three months, to wit, &c., plaintiff gave defendant notice that he required him *to join plaintiff's establishment for the purpose of appearing and performing in the performances to be produced at the said establishment under the direction of plaintiff*; and although a reasonable time had elapsed from the giving of such notice to *the commencement of the suit*, defendant did not nor would join the said establishment at P., nor appear or perform in the performances to be produced.

Held, upon special demurrer, that as plaintiff's establishment at P. was alleged to be "for equestrian performances," it sufficiently appeared that the notice given to join plaintiff's establishment was a notice to

perform "on the stage and in the ring."

Held also, that the declaration averred a good breach of the promise laid—the promise to perform as an equestrian on the stage and in the ring, and to attend rehearsals when required by the plaintiff, involving an engagement so to join an establishment of plaintiff for equestrian performance, as to be ready to accomplish the objects of the requisition.

Held also, that it sufficiently appeared—from the date of the writ, and from the averment that a reasonable time had elapsed from the giving of the notice to the commencement of the suit,—that a reasonable time had elapsed after the notice and before the expiration of the three months. *Batty v. Melillo*, 571

7. *Seemle*, that in debt against the sheriff under 29 Eliz. c. 4, to recover treble damages for taking greater fees than are allowed by that act on several different writs of fi. fa., it is not sufficient to allege generally that the defendant took —*l.*, being a larger sum, &c.; but the declaration should state what he ought to have taken, and what was the excess, on each writ. *Berton v. Lawrence and Others*, 668

8. By a deed executed by defendants, W. T., a bailiff, and two sureties to plaintiff, the sheriff, the defendants covenanted to save harmless the plaintiff from any action brought against him "touching or concerning any matter wherein the said bailiff shall act or assume to act as bailiff," or "for by reason of any extortion or escape happening by the act or default of the said bailiff." The plaintiff in declaring on this, after stating an escape, alleged that it happened "by the default of the defendant, W. T., and not otherwise, he the defendant, W. T., then being bailiff of the said plaintiff as such sheriff." The defendants, after craving oyer of the bond, pleaded

that the default "was not a default of him the said W. T., as such bailiff of the plaintiff."

Held, first, that the plea was bad on special demurrer, for ambiguity.

And, secondly, that although the declaration was, *seemle*, bad on special demurrer for not shewing that the default was a default of W. T. as bailiff, it was sufficient, after pleading over. *Cubitt and Another v. Thompson and Others*, 672

9. A declaration, after alleging that plaintiffs were tenants of chambers to H., at the rent of 84*l.*, stated that upon their letting those chambers to defendant as their tenant at the rent of 84*l.*, defendant promised to pay the said rent to H., or, if not, that he would indemnify plaintiffs in respect thereof, and would pay the same to them. Averment, that rent became due from plaintiffs to H. but defendant did not pay H., but plaintiffs paid him, and requested defendant to pay them, who refused &c.

Whether the above declaration means that defendant promised to pay to H. the rent due from plaintiffs to H., or the rent due from defendant to plaintiffs, *quære*.

Held, however, that it does not mean that defendant's promise was to extend further than his liability to pay rent under his own tenancy to plaintiffs. *Smith and Another v. Lovell*, 79

DECLARATION (AMENDMENT OF).

See VENUE, 2.

DEED OF ARRANGEMENT.

See BANKRUPTCY LAW CONSOLIDATION ACT, 1.
PLEA, 4.

DEFENDANTS, SEVERAL (IN INDICTMENT AGAINST).

See CERTIORARI, 2.

DEPOSITIONS (COPIES OF).

DEFENDANTS, SEVERAL (CHANGING VENUE BY ONE OF).

See VENUE, 1.

DELEGATION (OF AUTHORITY BY ARBITRATOR).

See ARBITRATION, 7.

DEMAND (REDUCED BY PAYMENTS).

See COSTS (SUGGESTION TO DEPRIVE PLAINTIFF OF), 19.

DEMAND (SPLITTING OF).

See COUNTY COURT, 5.
PROHIBITION, 4.

DEMURRER.

See COMPANIES CLAUSES CONSOLIDATION ACT, 1.

COUNTY COURT, 3, 6.

DECLARATION.

INSOLVENT DEBTOR, 2.

MISJOINDER.

NEW ASSIGNMENT.

PLEA.

PROHIBITION, 3.

REPLICATION.

USURY.

DEPENDENT (CONDITION).

See LANDS CLAUSES CONSOLIDATION ACT (REFERENCE UNDER), 2.

DEPONENT'S DESCRIPTION.

See AFFIDAVIT, 2.

DEPONENT'S ADDITION.

See AFFIDAVIT, 3.

DEPOSITIONS (COPIES OF).

The 11 & 12 Vict. c. 42, s. 27, which gives to an accused party the right to a copy of the depositions taken against him, applies only to the case of a person committed to prison or admitted to bail for the purpose of being tried.

Where, therefore, one H. had been committed to gaol until he should

DISCHARGE, &c. 815

give sufficient securities for keeping the peace, and for appearing at the sessions or the assizes to do what should be then enjoined by the Court: *Held*, that he was not entitled to a copy of the depositions under that section.

A party applying to this Court for a rule under the 11 & 12 Vict. c. 44, s. 5, calling upon the justices to furnish copies of the depositions taken against him, must shew a right existing at the time of his application to the Court, as well as at the time of the refusal by the justices to grant the copies. *Regina v. James Davies, Esq., and two Others, Justices of Herefordshire*, 323

"DEPTH."

See ARBITRATION, 7.

DETAINER.

See BANKRUPTCY LAW CONSOLIDATION ACT, 4.

DETINUE.

See COUNTY COURT, 4.

Semble, per *Maule, J.*, that detinue is an action of contract and not of tort. *Hand v. Daniels*, 420

DIES DATUS CLAUSE.

See TRIAL BY RECORD, 2.

DISCHARGE AND SATISFACTION.

See PLEA, 5.

DISCHARGE OUT OF CUSTODY.

See ARREST, JUDGE'S ORDER TO (UNDER 1 & 2 VICT. c. 110).

BANKRUPTCY LAW CONSOLIDATION ACT, 3.

COUNTY COURT, 1, 2, 7, 8.

HUSBAND AND WIFE.

INSOLVENT DEBTOR, 3.

PROHIBITION, 8.

DISCLAIMER.

See PATENT.

DISHONOUR (NOTICE OF).

See COSTS (SUGGESTION TO DEPRIVE PLAINTIFF OF), 11.

DISJUNCTIVE (ORDER OF COUNTY COURT IN).

See COUNTY COURT, 1, 2, 7.

DISMISSAL OF SERVANT.

See PLEA, 3.

DISTURBANCE.

See FERRY (CASE FOR DISTURBANCE OF).

DUPLICITY.

See REPLICATION, 1, 4.

EJECTMENT.

Where the notice at the foot of the declaration in ejectment in a country cause, required the tenant to appear "within the first four days" of the Term, instead of within the Term generally; the Court discharged a rule nisi which had been obtained for judgment against the casual ejector; dubitante, *Cole-ridge, J. Doe dem. Todd and Another v. Roe*, 71

ERROR CORAM VOBIS.

See OUTLAWRY (PROCEEDINGS IN).

ESCAPE.

See DECLARATION, 8.
PLEA, 7.

Although the 5 & 6 Vict. c. 98, s. 31, enacts, that if a debtor in execution escape, the sheriff shall be liable only to an action upon the case for the damage sustained by the plaintiff, the Court will grant an at-

tachment against the sheriff for returning the escape.

The Court, however, will, in such a case, measure the amount of the fine to be imposed upon the sheriff, by the damage sustained.

Where, therefore, an attachment was issued against the sheriff for returning an escape, the Court gave the plaintiff liberty to bring an action against the sheriff to ascertain the amount of damage, and stayed the proceedings upon the attachment in the meanwhile. *Regina v. The Sheriff of Leicestershire, in a cause of Arden v. Bingham*, 414

ESTOPPEL.

See COUNTY COURT, 6.
PLEA, 2.

"EVENT" OF THE CAUSE.

See ARBITRATION, 10, 12.

EVICTION.

See REPLICATION, 5.

EVIDENCE.

See ARBITRATION, 2.
PATENT.

EVIDENCE OF DATE OF WRIT OF SUMMONS.

See DATE OF WRIT OF SUMMONS (EVIDENCE OF).

EVIDENCE DISCOVERED SINCE THE MAKING OF AN AWARD.

See ARBITRATION, 9.

EXECUTION.

See BANKRUPTCY LAW CONSOLIDATION ACT, 4.

HUSBAND AND WIFE.

ORDER TO CHARGE STOCK, 1.

1. Execution upon a judgment re-

covered against an incorporated joint-stock company within the provisions of the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16) can be obtained against a shareholder by sci. fa. only.

The Court will not grant a sci. fa. unless it be shewn that sufficient property of the company cannot be found to satisfy the judgment.

The return of nulla bona on writs of fi. fa. is not sufficient evidence that such property cannot be found.

Hichins v. The Kilkenny Great Southern and Western Railway Company, 712

2. Whether execution upon a judgment recovered against a railway company governed by the provisions of the Companies Clauses Consolidation Act, should issue against a shareholder, depends not only upon the plaintiff's failure to find sufficient property and effects of the company to satisfy his judgment, but also upon his having used due diligence to find such property and effects.

Whether he has used due diligence is a preliminary matter to be decided by the Court upon the motion for leave to issue such execution.

Where, however, a sci. fa. issues against a shareholder upon a judgment recovered against the company, such due diligence should be stated on the writ, and may be traversed and tried by the jury.

Semble, that the proper form of issuing execution under the 8 & 9 Vict. c. 16, s. 36, against the shareholder of a railway company, is by sci. fa. *Devereux v. The Kilkenny and Great Southern and Western Railway Company,* 788

3. By a deed of settlement constituting a joint stock banking company, it was provided, that before the husband of a shareholder became a member of the company, he should take certain steps therein specified. A woman who was a shareholder of the company before her marriage,

continued after her marriage without her husband's knowledge, to receive dividends and pay calls in her maiden name upon her shares, which remained registered in that name; and she was so described in the list of shareholders returned to the Stamp Office. Her husband knew that she was a shareholder, but did not take the steps required by the deed of settlement to become a shareholder in respect of her shares, or do any other act respecting them.

Held, that execution could not be sued out against the husband upon a sci. fa. under the 7 Geo. 4, c. 46, s. 13, as a member for the time being. *Dodgson, Public Officer of the Bank of Whitehaven v. Bell,* 812

EXECUTOR.

See DECLARATION, 2.
PLEA, 1.

EX PARTE APPLICATION.

See COSTS (CERTIFICATE UNDER 4 ANN. c. 16).

EXTORTION (DEBT AGAINST SHERIFF FOR).

See DECLARATION, 8.

FALSE DESCRIPTION.

See AFFIDAVIT, 2.

FALSE PRETENCE.

See COUNTY COURT, 1, 2.

FEE.

See ARBITRATION, 13.
COSTS, 3.
PAUPER PLAINTIFF, 1.

FEIGNED ISSUE.

See COMMONS INCLOSURE ACT.

FERRY (CASE FOR DISTURBANCE OF).

A count alleged that the defendant, contriving to disturb the plaintiffs in the enjoyment of their ferry, inju-

riously and against their will carried passengers across the river *near* the plaintiff's ferry, per quod they had been deprived of profits of their ferry, and disturbed in the possession of it. *Held*, upon motion in arrest of judgment, that the count disclosed a good cause of action, and was not bad for omitting to aver that the defendant, in carrying near the plaintiff's ferry, either intended to defraud the plaintiffs, or to set up a new ferry. *Blacketer v. Gillett*, 88

FILE (TAKING AFFIDAVIT OFF THE).

See AFFIDAVIT, 1.

FILING JUDGE'S ORDER.

See BANKRUPTCY LAW CONSOLIDATION ACT, 2.

FINAL ORDER.

See INSOLVENT DEBTOR.

FINALITY OF AWARD.

See ARBITRATION, 4.

FINE ON SHERIFF FOR RETURNING ESCAPE.

See ESCAPE.

FORMA PAUPERIS.

See PAUPER PLAINTIFF.

FRESH AFFIDAVITS.

See ARREST, JUDGE'S ORDER TO (UNDER 1 & 2 VICT. c. 110).
SECOND APPLICATION.

FURTHER MAINTENANCE.

See PLEA, 1, 4.

FUTURE DAY (COMMITMENT ON).

See COUNTY COURT, 7.

FUTURE ESTATE.

See BANKRUPTCY LAW CONSOLIDATION ACT, 4.

GAOLER.

See INSOLVENT DEBTOR, 3.

"IMMEDIATELY."

GROUND(S) (OF APPEAL).

See APPEAL, 1, 3.

GUARDIANS (BOND TO).

See DECLARATION, 5.
PUBLIC OFFICER.

HABEAS CORPUS.

See COUNTY COURT, 1.
INSOLVENT DEBTOR, 3.

A prisoner who conducts in person an action in which he is plaintiff is not entitled to a habeas corpus to bring him up to the Judge's Chambers to oppose a summons for leave to plead several matters, unless the Judge, in his discretion, think that there is an urgent necessity for his presence. *Ford v. Sir James Graham, Bart.*, 60

HUSBAND AND WIFE.

See COSTS, (SUGGESTION TO DEPRIVE PLAINTIFF OF), 13.
EXECUTION, 3.

Where in an action against husband and wife, for an assault by the wife, the wife having no separate property, only had been taken in execution, the husband having become a bankrupt, the Court refused to discharge her out of custody.

Section 112 of the 12 & 13 Vict. c. 106, which takes away protection from bankrupts for debts arising from judgments in actions of assault, applies only to assaults committed by the husband, and not to those committed by the wife. Per *Alderson B. Larkin v. Marshall et Ux.* 18

IDENTITY OF CAUSES OF ACTION.

See PLEA, 2.

IMMATERIAL AVERMENT.

See PLEA, 6.

"IMMEDIATELY."

See APPEAL, 2.

INCLOSURE COMMISSIONER
(AWARD OF).

See PRACTICE, 1.

INCONGRUOUS.

See REPLICATION, 3.

INDEMNITY (AWARD OF
BOND OF).

See ARBITRATION, 1.

INDEMNITY (CONTRACT OF).

See DECLARATION, 9.

INDICTMENT.

See BAIL.

CERTIORARI, 2.

INDUCEMENT (INCONGRU-
OUS).

See REPLICATION, 3.

INFERIOR COURT.

See COUNTY COURT.

RULE OF COURT (MAKING ORDER
OF INFERIOR COURT).

INFRINGEMENT OF PATENT.

See PATENT.

INQUISITION (COSTS OF).

See TITHE COMMUTATION ACT (COSTS
OF INQUISITION UNDER).

INSOLVENT.

See COSTS (SECURITY FOR), 1.

PROHIBITION, 8.

INSOLVENT DEBTOR.

1. The 11 & 12 Vict. c. 7, s. 2, enacts, that from and after the passing of the act, the first class of prisoners in the Queen's prison shall be composed of, among other persons, debtors refusing to file a schedule of their property when ordered to do so.

Held, that an insolvent debtor

who had been ordered to file his schedule before the passing of the act, was properly placed in the first class. *Stead v. Anderson*, 109

2. The final order for protection under the 7 & 8 Vict. c. 96, is a protection only in respect of debts named in the insolvent debtor's schedule; therefore to a declaration in debt, a plea that after the accruing of the debt, the defendant petitioned the Insolvent Debtors' Court, and that thereupon a final order for protection was made; and that the debt was contracted before the filing of the petition; was, upon general demurrer, *held* bad, for not alleging that the debt was named in the schedule.

Semble, that in respect of debts named in the schedule, the final order operates not only as a protection to the person of the debtor from all process, but also as a bar to an action for such debts. *Phillips v. Pickford*, 136

3. A warrant of the Insolvent Court, dated the 8th of April, 1850, under 1 & 2 Vict. c. 110, ordering that a prisoner "shall be discharged" "forthwith, as to the detainer of" S., and "as to the detainer of" H., "at the period of three calendar months" "from the 7th of January, 1850,"—the date of the vesting order,—is a sufficient authority to the keeper of the prison for his discharge forthwith; and is an answer to an action for not bringing up the prisoner under a habeas corpus ad satisfaciendum, delivered to the keeper before, but returnable after such discharge, although returnable within three months from the date of the adjudication and warrant.

The keeper in such action may plead not guilty by statute, and give the warrant in evidence under that plea.

Quære, whether an adjudication of the Insolvent Court in the same form is good. *Harvey v. Hudson*,

850 JOINT STOCK COMPANY.

INSOLVENT DEBTORS' COURT (DISCHARGE BY).

See BANKRUPTCY LAW CONSOLIDA-
TION ACT, 4.
COUNTY COURT, 1.
REPLICATION, 6.

INSUFFICIENCY OF AFFI- DAVITS.

See SECOND APPLICATION.

INTERLINEATION.

See ORDER TO CHARGE STOCK, 1.

INSULT.

See COUNTY COURT, 3.

INVENTION

See PATENT.

IRREGULARITY.

See AFFIDAVIT, 3.
COSTS (CERTIFICATE UNDER
43 ELIZ. c. 6).
COSTS (SUGGESTION TO DEPRIVE
PLAINTIFF OF) 5.
SERVICE OF WRIT OF SUMMONS
ABROAD.
SUGGESTION.

IRRELEVANT MATTER.

See AFFIDAVIT, 1.

ISSUES (SEVERAL).

See COSTS, 1, 2.

ITEMS (WHEN CONSTITUT- ING ONE CAUSE OF ACTION).

See COUNTY COURT, 5.
PROHIBITION, 4.

JOINT-STOCK COMPANY.

See COMPANIES CLAUSES CONSOLIDA-
TION ACT.
DECLARATION, 2, 3.

JUDGE'S ORDER.

See EXECUTION, 1, 2.

LANDS CLAUSES CONSOLIDA-
TION ACT (REFERENCE UN-
DER).

NONSUIT (JUDGMENT AS IN
CASE OF A).

SET OFF.

JOINT STOCK COMPANIES WINDING-UP ACT.

1. Where the affairs of a railway company have been referred to a Master in Chancery under 11 & 12 Vict. c. 45, this Court will stay proceedings in an action against one of the provisional committee for a debt of the company even after judgment, the plaintiff being bound under that act to prove his debt before the Master. *MacGregor v. Keiley*, 182

2. Where a shareholder in a joint stock company, who had, together with other shareholders, made a joint and several promissory note, was sued in his several capacity, the Court refused to stay the action under sect. 73 of the Joint Stock Companies Winding-up Act, (11 & 12 Vict. c. 45). *Penkiville v. Connell*, 398

3. A creditor of a joint stock company who has sued an individual shareholder, and whose action has been stayed under sect. 73 of the Winding-up Act (11 & 12 Vict. c. 45), may continue his action so soon as he has proved his claim before the Master, although he has taken no further steps to enforce his claim under that act. *Prescott and Others v. Hadow*, 640

JUDGE AT CHAMBERS.

See CERTIORARI, 1.

HABEAS CORPUS.

SECOND APPLICATION.

JUDGE'S ORDER.

See ARREST, JUDGE'S ORDER TO
(UNDER 1 & 2 VICT. c. 110).
BANKRUPTCY LAW CONSOLIDA-
TION ACT, 2.

JUDGMENT RECOVERED.

JUDGE'S ORDER TO CHARGE STOCK.

See ORDER TO CHARGE STOCK.

JUDICIAL NOTICE.

The Court will take judicial notice that the ratepayers of a parish are so numerous that it would lead to prolixity to set forth their names in pleading. *Kingsford v. Dutton*, 479

JUDGMENT IN DEBT ON BOND (WHERE SEVERAL BREACHES).

Upon demurrer to declaration upon a bond, the judgment of the Court is upon the declaration, and not upon the breaches assigned. Where, therefore, a declaration upon a bond assigned two breaches, one of which was good, and the other bad, the Court gave judgment generally for the plaintiff for the penalty of the bond; and not for the plaintiff upon the good breach of the damages to be assessed upon it, and for the defendant as to the bad breach. *Kingsford v. Dutton*, 479

JUDGMENT.

See HUSBAND AND WIFE.
TRIAL BY RECORD.

JUDGMENT (SETTING ASIDE).

See COSTS (SUGGESTION TO DEPRIVE PLAINTIFFS OF), 4, 5.

JUDGMENT (SIGNING).

See ARBITRATION, 10.
PAUPER PLAINTIFF, 1.

JUDGMENT RECOVERED.

See PLEA, 2.
REPLICATION, 2.

JURAT.

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JUDGMENT CREDITOR.

See BANKRUPTCY LAW CONSOLIDATION ACT, 4.

JUDGMENT AGAINST THE CASUAL EJECTOR.

See EJECTMENT.

JUDGMENT NON OBSTANTE VEREDICTO.

See BANKRUPTCY LAW CONSOLIDATION ACT, 1.

JUDGMENT AS IN CASE OF A NONSUIT.

See DEATH OF ONE OF SEVERAL PLAINTIFFS.
NONSUIT (JUDGMENT AS IN CASE OF A).

JURAT.

See AFFIDAVIT, 1.

1. An affidavit, the Jurat of which was "Sworn the —— day of November, 1842:" *Held* defective. *Duke of Brunswick v. Harmer*, 505

2. The jurat of an affidavit was as follows: "Sworn by" A. B., &c., "at my Chambers," &c. "Dated this 24th day of April, 1850. V. Williams." *Held* defective, as not shewing when the affidavit was sworn; and the Court discharged a rule nisi obtained upon it, but without costs, and gave the party liberty to renew the application. *In re Lloyd*, 545

3. The jurat of an affidavit was in the following form:—"Sworn by" "at Glasgow, in the county of Lanark, in Scotland, the fifth day of June, eighteen hundred and fifty years, before me," G. R. T., "a commissioner for Scotland, for taking affidavits in the Court of Queen's Bench at Westminster." *Held*, that the date and the authority of the commissioner were sufficiently stated. *Bell v. The Port of London Assurance Company*, 691

JURISDICTION (DECLINING OF).

See LIVERPOOL SANATORY ACT,
(9 & 10 VICT. C. CXXVII).
REMOVAL (ORDER OF), 1.

JURY.

See SPECIAL JURY.

JUSTICES.

See APPEAL, 1, 2.
BASTARDY (ORDER IN).
RULE OF COURT (UNDER 11 & 12
VICT. C. 44, s. 5).

JUSTIFICATION OF KEEPER OF PRISON UNDER WARRANT.

See INSOLVENT DEBTOR, 3.

LANDLORD AND TENANT.

See DECLARATION, 9.
PLEA, 6, 8.
REPLICATION, 3, 4, 5, 6.

LANDOWNER.

See LANDS CLAUSES CONSOLIDATION ACT (REFERENCE UNDER).

LANDS CLAUSES CONSOLIDATION ACT (REFERENCE UNDER).

1. An award made under the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), is valid, although the costs are not settled in the award itself, but by a separate and subsequent instrument.

Sect. 34 directs that the costs are to be "settled by the arbitrators," not mentioning the umpire. *Held*, that where the award is made by the umpire, he is the proper person to settle the costs.

Held also, that the settlement of the costs is good, although such instrument is not made and published till more than three months after the matter was referred to arbitration.

Held also, that an averment that

the umpire "was required by the plaintiff to settle and determine the costs to be paid by the defendants to the plaintiff, under the Lands Clauses Consolidation Act," sufficiently imports that the umpire had authority to settle the costs under sect. 34. *Gould v. The Staffordshire Potteries Waterworks Company*, 264

2. By a deed of submission made between L. and a railway company, after reciting that the company were authorized to take certain lands, of which L. was or claimed to be owner, that they had given him notice that they required his lands, and that it was agreed that they should become the purchasers thereof in the mode thereafter pointed out;—it was covenanted that it should be referred to W. T. to determine the value to be paid for the lands; that the purchase-money should be paid within three days after the making of the award; and "thereupon" L. should execute a conveyance; "subject" "to the payment of the amount of such purchase-money into the Court of Chancery under the circumstances and in the manner provided for by the Lands Clauses Consolidation Act, 1845." The arbitrator found the value of the land at a certain sum, and directed it to be paid "within three days after," &c., "subject," &c., (following the words of the submission). The submission having been made a rule of Court, and a rule having been obtained, calling upon the company to shew cause why they should not pay the sum of money, (under 1 & 2 Vict. c. 110, s. 18):

Held, that assuming even that the arbitrator had exceeded his jurisdiction in ordering the money to be paid, the rest of the award was good; and that, as the award ascertained the amount of the purchase-money which the company by their deed of submission had agreed to pay, there was sufficient to enable the Court to make an order on them to pay it.

Held also, that the payment of the money and the execution of the conveyance by L. were not dependent conditions, but that the payment was to precede the conveyance; and that it was, therefore, no answer to the present rule that a conveyance had not been tendered.

Held also, that it was no objection that it was not shewn that the company had taken possession of the land. *In re an Arbitration between Ralph Lindsay, and the Direct London and Portsmouth Railway Company,* 529

3. A., the owner of lands which were required for the purposes of a railway company, gave the company notice (under the 8 & 9 Vict. c. 18, s. 25), that it was his *intention* to nominate and appoint S. M. as his arbitrator, and that if for fourteen days the company failed to appoint an arbitrator, he would appoint S. M. to act for both parties. The company failing, A. appointed S. M., who made an award in his favour. The appointment of S. M., which was made a rule of Court, contained a recital of the above notice. The Court refused either to enforce the award, or to set aside the rule of Court or award.

Semble, that to entitle a party to appoint an arbitrator to act for both parties, under the 8 & 9 Vict. c. 18, s. 25, he should first appoint his own arbitrator, and give notice of such appointment to the company before he requests them to appoint their arbitrator. *In the matter of an Arbitration between Bradley and the London and North Western Railway Company,* 597

"LAST" PLACE OF ABODE.

See BASTARDY (ORDER IN), 3.

LEGAL EVENT OF THE CAUSE.

See ARBITRATION, 10, 12.

LETTERS TESTAMENTARY.

See PLEA, 1.

LIABILITY (PRIMARY).

See DECLARATION, 9.
PLEA, 6.

LIBERUM TENEMENTUM.

See NEW ASSIGNMENT.

LIEN.

See ATTORNEY (LIEN OF).

LIMITATIONS (STATUTE OF).

See ATTORNEY, 1.

PROHIBITION, 1.

WRIT OF SUMMONS (AMENDMENT OF).

LIVERPOOL SANATORY ACT, (9 & 10 VICT. c. CXXVII.)

The 156th section of a local sanatory Act (9 & 10 Vict. c. cxxvii.) enacts, that "the net annual value" of property to be rated under the act shall be "ascertained according to the meaning of the words 'net annual value' in the 6 & 7 Wm. 4, c. 96, and shall be "estimated according to such value as the same is" "rated" "in the rate" "for the relief of the poor in the year preceding." *Held*, that the poor rate of the preceding year was conclusive evidence of the net annual value, notwithstanding that section 158 directs, that where property is omitted in the poor rate, or has increased in value since the poor rate, a new valuation is to be made; and sects. 170 and 171, which give the appeal, invest the sessions with the same powers as to amending or quashing rates as are by law vested in sessions as to poor rates.

851 " MATERIAL POINT."

The sessions having so decided, and refused to hear any further evidence : *Held*, on application to this Court for a mandamus, that the dismissal of the appeal was not a declining of jurisdiction but a decision upon the hearing of the appeal ; and, therefore, that this Court would not issue a mandamus even if the construction put upon the act were wrong. *Regina v. The Recorder of Liverpool*, 682

LORD CHANCELLOR (PARTY TO CAUSE).

See TRIAL AT BAR.

" MAJORITY OF JUSTICES PRESENT."

See BASTARDY (ORDER IN), 1.

MALICIOUSLY SUING OUT CAPIAS (CASE FOR).

See DECLARATION, 4.

MANDAMUS.

See APPEAL, 8.

LIVERPOOL SANATORY ACT (9 & 10 VICT. C. CXXVII).

REMOVAL (ORDER OF).

RULE UNDER 11 & 12 VICT. C. 44, s. 5.

WITNESS (COMMISSION TO EXAMINE).

MARRIED WOMAN.

See AFFIDAVIT, 2.

COSTS (SUGGESTION TO DEPRIVE PLAINTIFF OF), 13.

EXECUTION, 3.

HUSBAND AND WIFE.

MATERIAL EVIDENCE (UNDERTAKING TO GIVE).

See VENUE, 2.

" MATERIAL POINT."

See COSTS (SUGGESTION TO DEPRIVE PLAINTIFF OF), 3, 11, 16.

MISJOINDER.

MATTERS IN DIFFERENCE.

See ARBITRATION, 1, 10, 11.

MEASURE OF DAMAGES.

See ESCAPE.

MESSENGER OF COURT OF BANKRUPTCY.

See WARRANT (OBEDIENCE TO).

MISCONSTRUCTION OF ORDER OF REFERENCE.

See ARBITRATION, 8.

MISDESCRIPTION OF NAME IN AFFIDAVIT.

See AFFIDAVIT, 2.

MISCONDUCT OF SERVANT.

See PLEA, 3.

MISJOINDER.

A declaration contained eight counts. The first, second, fifth, sixth, seventh and eighth were in case. The third count stated that the plaintiff accepted a bill for 95*l.* for the accommodation of defendant and another ; and that in consideration thereof defendant *undertook and agreed* to provide 50*l.* in part payment of another acceptance of the plaintiff. Nevertheless the defendant disregarding his duty, did not provide, &c. but neglected, &c. ; and although plaintiff delivered to defendant the said acceptance for 95*l.*, defendant refused to return it, or take it up when due.

The fourth count stated that the said acceptance for 95*l.* and another for 161*l.*, being outstanding in the hands of R. S., the defendant proposed, that if plaintiff would give him a cheque for 41*l.*, and accept two bills for 100*l.*, defendant would get back the above acceptances, or return the proposed bills ; that defendant gave a cheque and the two proposed bills,

NEGLIGENCE, &c.

and that thereupon *it became defendant's duty* to get back the outstanding bills, or return the others. Yet the defendant, disregarding his duty, did not get back, &c., or return, &c.

Held, upon general demurrer, that the third and fourth counts, being in assumpsit, were misjoined with the other counts. *Courtenay v. Earle*, 764

MONEY HAD AND RECEIVED.

See TENANT IN COMMON.

"MONTH."

See BANKRUPTCY LAW CONSOLIDATION ACT, 1.

MULTIFARIOUSNESS.

See REPLICATION, 4.

MUTUAL RELEASES.

See ARBITRATION, 1.

NAME.

See AFFIDAVIT, 2.

ATTORNEY (NAME OF).

COSTS (SUGGESTION TO DEPRIVE PLAINTIFF OF), 8.

PETTY BAG OFFICE.

PLEA, 4.

The statement of the names of persons in pleading is not necessary, when it would by reason of their number lead to prolixity. *Kingsford v. Dutton*, 479

NARROW (REPLICATION).

See REPLICATION, 1.

NE RECIPIATUR.

See COSTS OF THE DAY, 2.

NEGLIGENCE OF DEFENDANT'S ATTORNEY.

See NEW TRIAL.

PAUPER PLAINTIFF, 2.

NEGLIGENCE OF SERVANT.

See PLEA, 3.

NEW ASSIGNMENT. 855

NEMO DEBET BIS VEXARI PRO EADEM CAUSA.

See BANKRUPTCY LAW CONSOLIDATION ACT, 4.

"NET ANNUAL VALUE."

See LIVERPOOL SANATORY ACT, (9 & 10 VICT. C. CXXVII.).

NEW ASSIGNMENT.

The declaration alleged that the defendants broke and entered the plaintiff's dwelling-house, and made a noise, and broke doors of the plaintiff and belonging to the house, &c.; and ejected and expelled the plaintiff and his family from the possession of the house, and kept them so ejected and expelled; and also seized and took goods of the plaintiff in the house, and threw them into the street, &c.

Plea 3, "As to seizing and taking the goods," that one of the defendants was possessed of the house; and justification by him and the other as his servant, on the ground that the goods were incumbering the house.

Plea 4 and 5. "As to the several supposed trespasses in and to the said dwelling-house, in which, &c., and as to seizing and taking the said goods," liberum tenementum in A. and B. respectively, and justification by defendants as their servants.

Replication to third plea, de injuriâ.

To fourth and fifth pleas, traverse of liberum tenementum.

New assignment: that the action was brought not only for trespasses mentioned in the introductory part of the third, fourth, and fifth pleas, but also for that defendants, at the time when, &c., in the declaration mentioned, ejected and expelled plaintiff and his family, &c.

Held, on special demurrer, that the new assignment was bad; being inapplicable to the third plea, and the trespasses stated in it being

already justified by the fourth and fifth pleas. *Meriton v. Coombes and Another*, 510

NEW TRIAL (RULE FOR).

See PRACTICE, 3.

NEW TRIAL.

Where a cause has been regularly tried as undefended, and a verdict taken for the plaintiff, in the negligent absence of the defendant's attorney, the Court will grant a new trial on an affidavit of merits; but only on payment of costs. *Third v. Goodier*, 717

NON OBSTANTE VEREDICTO (JUDGMENT).

See BANKRUPTCY LAW CONSOLIDATION ACT, 1.

NONSUIT (JUDGMENT AS IN CASE OF A).

See DEATH OF ONE OF SEVERAL PLAINTIFFS.

1. The affidavit sworn in Easter Term, in support of a rule for judgment as in case of nonsuit, stated that "notice of trial" was given for the sittings after Michaelmas Term, and that the plaintiff did not proceed to trial in pursuance of his said notice.

Held, insufficient; as the cause might have been tried, although not in pursuance of the said notice, in the interval between the alleged default and the motion for the rule. *Edgar v. Halliday*, 367

2. When there are issues in law and issues in fact, the time within which the plaintiff must proceed to trial runs from the decision of the former. *Chrisp v. Attwell*, 454

3. The Court will not give judgment as in case of a nonsuit in an action against a member of a provisional committee of a joint stock

NOTICE OF TRIAL.

company, where proceedings are pending in the Court of Chancery for the winding up of the company under the 11 & 12 Vict. c. 45; unless it appears that the plaintiff has been guilty of neglect in going before the Master and proving his claim. *Birch and Another v. Lowndes*, 52

4. A defendant cannot move for judgment as in case of nonsuit after a peremptory undertaking, until after the sittings in the Term in which the default is made, are concluded. *Burn v. Cook*, 73

"NOT INDEBTED" (REPLICATION OF).

See SET-OFF.

NOTICE.

See APPEAL.

BANKRUPTCY LAW CONSOLIDATION ACT, 1.

BASTARDY (ORDER IN), 2.

EJECTMENT.

JUDICIAL NOTICE.

NOTICE OF TRIAL.

PATENT.

NOTICE OF TRIAL.

See NONSUIT (JUDGMENT AS IN CASE OF).

PRACTICE, 5.

TRIAL BY RECORD, 1.

After notice of trial and continuance once in the Term, the plaintiffs gave a fresh notice of continuance in the ordinary form on the last day but one of the Term, to the first sittings in the following Term. *Held*, that the time intervening between the Terms being sufficient to enable the plaintiff to give an original notice of trial, and no particular form of words being necessary to constitute a valid notice of trial, the notice of continuance so given might operate as a good original notice of trial, whereupon to found a subsequent notice of continuance given in the following Term. *Cory and Another v. Hotson*, 2

ORDER IN BASTARDY.

NUL TIEL RECORD.

See TRIAL BY RECORD.

NULLA BONA (RETURN OF).

See EXECUTION, 1.

NULLITY.

*See SERVICE OF WRIT OF SUMMONS
ABROAD.*

OATH.

*See BASTARDY (ORDER IN), 1.
COUNTY COURT, 1.*

OBEDIENCE TO WARRANT.

See WARRANT (OBEDIENCE TO).

OBJECTIONS (NOTICE OF).

See PATENT.

**OFFENCE (UNCERTAINTY IN
DESCRIPTION OF).**

See COUNTY COURT, 1, 2, 3.

OFFICER OF COUNTY COURT.

*See COSTS (SUGGESTION TO DEPRIVE
PLAINTIFFS OF), 4, 8.*

OFFICER (PUBL C).

*See PUBLIC OFFICER.
SUGGESTION.*

**OFFICE COPIES OF AFFIDA-
VITS.**

See PRACTICE, 4.

**OMISSION OF DEPONENT'S
ADDITION.**

See AFFIDAVIT, 3.

ONUS PROBANDI.

See PLEA, 3.

ORDER IN BASTARDY.

See BASTARDY (ORDER IN).

ORDER, &c.

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ORDER OF COUNTY COURT.

*See COUNTY COURT, 1, 2, 3, 7.
PROHIBITION, 1.*

**ORDER OF INSOLVENT
COURT.**

*See BANKRUPTCY LAW CONSOLIDA-
TION ACT, 4.
INSOLVENT DEBTOR, 2, 3.
REPLICATION, 6.*

ORDER OF REFERENCE.

*See ARBITRATION.
RULE OF COURT (MAKING ORDER
OF INFERIOR COURT).*

**ORDER OF REFERENCE (OF
BOROUGH COURT OF RE-
CORD).**

*See RULE OF COURT (MAKING ORDER
OF INFERIOR COURT).*

ORDER OF REMOVAL.

*See APPEAL, 3.
REMOVAL (ORDER OF).*

**ORDER OF SESSIONS (EN-
FORCING).**

*See RULE OF COURT (UNDER THE
12 & 13 VICT. c. 45, s. 18).*

ORDER TO CHARGE STOCK.

.1. It is no objection to a Judge's order charging stock standing in the name of the accountant general, that the order nisi requires the debtor to shew cause on a day, and not "within a time" named in the order.

Nor that such order purports to be made in pursuance of the 1 & 2 Vict. c. 110, alone, and not also of the 3 & 4 Vict. c. 82.

A judgment was entered in the Master's book as in a cause of "A. v. B." The plaintiff obtained an order to charge stock of the defendant standing in the name of the accountant general, which order was intituled "A. v. C. sued as B." A rule to rescind it having been obtained on the ground that it did not follow the judgment in its title,

the plaintiff produced the judgment paper, which was intituled in the same way as the order. *Held*, that the order was properly intituled.

Semble, that such an order is in the nature of a writ of execution, and ought to follow the judgment in its title.

The words "C. sued as" appeared to have been interlined: *Held*, per *Wilde*, C. J., that such interlineation must be presumed to have been made before the judgment paper was sealed by the Court. *Robinson v. Burbridge and Another*, 94

2. The Court has no jurisdiction to rescind the order of a Judge at Chambers charging stock or shares under 1 & 2 Vict. c. 110, s. 14. *Graham v. Connell*, 438

ORDER TO PAY MONEY. (UNDER 1 & 2 VICT. c. 110, s. 18).

See ARBITRATION, 10.

LANDS CLAUSES CONSOLIDATION ACT (REFERENCE UNDER), 2.

RULE FOR PAYMENT OF MONEY
(UNDER 1 & 2 VICT. c. 110,
s. 18).

OUTLAWRY (PROCEEDINGS IN).

In proceedings in outlawry after final judgment, the ca. sa. should be returnable on a day certain.

Where therefore, it appeared upon the record of such proceedings that the ca. sa. was returnable "immediately after execution," the Court, upon error coram vobis, reversed the outlawry. *Lery v. Haman*, 477

OVERSEERS (ATTORNEY OF).

See REMOVAL (ORDER OF), 2.

PARTICULARS OF DEMAND (IN COUNTY COURT.)

See PROHIBITION, 6.

PATENT.

PARTIES TO ACTION.

See COMPANIES CLAUSES CONSOLIDATION ACT, 1.

BANKING COMPANY.

PUBLIC OFFICER.

PATENT.

The notice of objections in sci. fa. to repeal a patent is not part of the record, although it forms part of the transcript sent for trial from Chancery to this Court.

A declaration in sci. fa. to repeal a patent, after stating that a patent had been granted to defendant "for improvements in instruments used for writing and marking, and in the construction of inkstands," suggested that the patent was bad, because (1) part of the invention was not of a new manufacture; (2) part was useless; (3) the defendant was not the inventor of the said invention within the realm; (4) the invention was not new, (5) nor invented by defendant; (6) and defendant did not enrol a specification. The defendant traversed the suggestions. The specification claimed eleven inventions: the first six were pens and pencils; the seventh and eighth were "instruments for marking," and the remainder were inkstands. The notice of objections stated objections to each of the claims; and as to the fifth, sixth, and eighth, alleged that they were not new nor useful, and that the seventh was useless and insufficiently described. After issue joined, and before the trial, the defendant inrolled a disclaimer of the fifth, sixth, seventh, and eighth claims. *Held*,

First, that the notice of objections could not be resorted to for the purpose of narrowing any of the issues to one claim.

Secondly, that the defendant was not bound to plead the disclaimer puis darrein continuance.

Thirdly, that the disclaimer was

PECULIAR (ROYAL).

receivable in evidence upon the trial of the sci. fa.

Fourthly, that it formed part of the specification, as the prosecutor, in putting in the latter, in effect put in the former also.

Fifthly, that the title of the patent was not more extensive than the invention described in the specification as amended by the disclaimer; inasmuch as the first six articles were instruments for marking as well as for writing.

Whether an action commenced after disclaimer for an infringement before disclaimer will lie, *quære*. *Regina, on the Prosecution of W. Davis, v. Mill*, 695

PAUPER PLAINTIFF.

1. A plaintiff who has obtained an order to sue in formâ pauperis, which order is still subsisting, is entitled to sign judgment upon a verdict in his favour, without payment of any fee; although he has recovered a sum exceeding 5*l*. *Hoare, a Pauper, v. Coupland*, 57

2. The privilege of a plaintiff suing in formâ pauperis does not extend to a step collateral to the cause, such as a rule calling on his attorney to pay the costs of the day incurred through his negligence. *Bell v. The Port of London Assurance Company*, 691

PAYMENTS (DEMAND REDUCED UNDER 20*l*. BY).

See COSTS (SUGGESTION TO DEPRIVE PLAINTIFF OF), 19.

PAYMENT IN SATISFACTION AND DISCHARGE.

See PLEA, 5.

PEACE (ARTICLES OF).

See ARTICLES OF THE PEACE.

PECULIAR (ROYAL).

See PLEA, 1.

PETTY SESSIONS. 859

PENALTY OF BOND.

See JUDGMENT IN DEBT OR BOND (WHERE SEVERAL BREACHES).

PENDENCY OF ANOTHER PLAINT.

See PROHIBITION, 2.

PEREMPTORY UNDERTAKING.

See DEATH OF ONE OF SEVERAL PLAINTIFFS.

NONSUIT (JUDGMENT AS IN CASE OF A), 4.

"PER QUOD."

See DECLARATION, 1.

PETITIONING CREDITOR.

See BANKRUPTCY LAW CONSOLIDATION ACT, 4.

PETTY BAG OFFICE.

See PATENT.

PROHIBITION, 7.

The 12 & 13 Vict. c. 109, s. 44, requires the name and address of any person party to any action, suit, or proceeding, now pending on the common law side of the Court of Chancery, or their attorney, to be entered in a certain book kept in the Petty Bag Office. This act repealed 11 & 12 Vict. c. 94, the 39th sect. of which was similar to the 44th sect. of the 12 & 13 Vict. c. 109. *Held*, that a compliance with the provision of the repealed act was a compliance with the new statute, and that a second entry of the name and address was not necessary. *In the matter of a Plaint in the Whitechapel County Court of Middlesex, between John Baddeley, Clerk, &c., plaintiff, and Benjamin Denton, defendant*, 172

PETTY SESSIONS.

See APPEAL, 2.

BASTARDY (ORDER IN), 1, 3.

PLACE OF ABODE.

See BASTARDY (ORDER IN), 3.

PLAINT.

See ATTORNEY, 2, 3.

CERTIORARI, 1.

PROHIBITION, 5, 6.

PLEA.

See BANKRUPTCY LAW CONSOLIDATION ACT, 1.

COMPANIES CLAUSES CONSOLIDATION ACT, 1.

COUNTY COURT, 3, 6, 7.

INSOLVENT COURT, 2.

INSOLVENT DEBTOR, 2, 3.

PROHIBITION, 3.

REPLICATION, 4.

SET-OFF.

USURY.

1. To a declaration in debt by the executor of P. R., the covenantee of a deed, the defendant, after craving oyer, of the letters testamentary, pleaded that the said P. R. died in the parish of Longfleet, and that before and at the time of his death he resided there, and had the said indenture there; that the parish of L. is a royal peculiar, and out of the jurisdiction of the Archbishop of Canterbury; by reason whereof, the proving of the will, and the granting of probate of all the goods, &c. in respect of the debt and cause of action, of right belonged and appertained to the Queen, and not to the said Archbishop: that the will was never proved before, nor were the letters testamentary ever granted by, the Queen: that the said letters testamentary produced, &c., and granted by the Archbishop, were of no effect against the defendant in respect of the said debt and cause of action in the first count mentioned, and save as aforesaid by the granting of these letters testamentary, the plaintiff never was executor of the will of the said P. R. *Held*, upon special demurrer, that

the plea was in bar of the action altogether, and not in bar of the further maintenance. *Held* also, that the plea was good. *Easton v. Carter*, 22.

2. To a count upon a bill of exchange, the defendant pleaded, by way of estoppel, that the plaintiff had, before this action, declared against the defendant in terms identical with those of the present declaration, that the defendant had pleaded thereto an agreement by the plaintiffs to give him time; that the plaintiffs replied *de injuria*, and that the defendant obtained judgment, and the plea averred the identity of the causes of action in the present and former action.

Replication, that the plaintiff gave the defendant the time mentioned, and that that time had elapsed before the commencement of the suit.

Held, upon demurrer, that the plea was good, and the replication bad.

Held also, that although the whole record in the former action was set forth in the plea, the Court could not inquire into the validity of the judgment in that action. *Overt and Another v. Harvey*, 2.

3. In an action brought by a servant for dismissing him before the period for which he was hired had expired, the declaration alleged that the deponent wrongfully dismissed the plaintiff "without any reasonable or probable cause." The defendant pleaded, "that after the making of the promise and agreement, and before and at the time of the dismissal and discharge of the plaintiff by the defendant, he the said plaintiff conducted himself in an improper, offensive, disobedient and insolent manner, and was guilty of habitual negligence and carelessness, inasmuch that the defendant was forced and obliged to dismiss and discharge the plaintiff, and could not longer keep him in his the defendant's service."

and the defendant was forced and obliged by such conduct of the plaintiff to put an end to such service and employ: without this, that the defendant wrongfully dismissed and discharged the plaintiff therefrom, without any reasonable or probable cause whatever, in manner and form as the plaintiff hath above in that behalf alleged." Conclusion to the country.

At the trial, the Judge refused to receive evidence of plaintiff's misconduct, deciding that the plea put in issue the dismissal only.

Held a misdirection, since although the allegation in the declaration was immaterial and surplusage, and the plea which put it in issue bad on demurrer, still the issue being raised, it ought to have been disposed of by the jury. *Held* also, that the defendant having the affirmative of the issue to prove, the onus probandi would be on him. *Lush v. Russell*, 369

4. A plea in bar of the further maintenance of an action of assumpsit, averred that the defendant was a trader within the Bankrupt Act of 1849; that he was at the time of making the deed after mentioned, indebted to the parties of the second part of that deed, and to divers other persons, in divers sums, and was and would be unable to pay them in full; that before the making of the said deed, to wit, after the coming into operation of the Bankrupt Act, to wit, on the 25th of October, 1849, as such trader made (*sic*) after the coming into operation of the Bankrupt Act, to wit, on the 7th of November in the year aforesaid, which said indenture bearing date, &c., to wit, the day and year aforesaid (*profert*), and made between the defendant of the first part, J. S., J. W., and J. P. of the second part, and the several persons who should execute, &c., of the third part, &c. The plea proceeded to state, that by the deed certain hereditaments,

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goods, &c., of the defendant were assigned to J. S., J. W., and J. P. upon trust, subject to certain provisions in the deed mentioned, to discharge certain charges and incumbrances, and pay certain costs, (which were not more particularly mentioned in the plea), and then to apply the surplus moneys in payment of the debts due to the parties of the second and third parts; the defendant covenanted to assist in carrying on the business, &c.; and the parties of the second and third parts covenanted, that if the defendant should observe his covenants, they would not sue him for their debts, and that if they should do so, the deed should be a sufficient release, and the defendant should be thereby released, and as such it should and might be pleaded by the defendant, &c. The plea then averred that the deed contained other provisions; that before the commencement of the suit, to wit, on the 7th of November, 1849, it was executed by divers, to wit, &c. creditors, who were six-sevenths in number and value; that the debt in the declaration mentioned was due to the plaintiffs at that time; that after the said suspension of payment, &c., the plaintiff had notice from the defendant of the execution of the deed. The plea then stated an application to the Court of Bankruptcy for a certificate of the execution of the deed, and the grant of it by that Court, averred a compliance with the several requisites of the act, and alleged a performance by the defendant of the covenants binding on him; whereby the deed became binding on the plaintiffs, and by reason whereof, and of suing the defendant in this action, the defendant, after the commencement of this action, to wit, on, &c., became released, &c., *Held*, upon special demurrer,

First, that the plea was not bad for not setting forth the names of the creditors of the defendant, or the

K K K

L. M. & P.

amounts of their debts, or the names of the parties to the deed; because to require such statement would lead to prolixity.

Secondly, nor for failing to state the date of the deed with certainty, because, although the averment preceding the statement of the contents of the deed was obscure, the date sufficiently appeared from the allegation immediately following that statement of the instrument;

Thirdly, nor for not setting forth the provisions, &c., and the primary trusts contained in the deed,—because the contents of the deed concerned the creditors alone, and not the Court.

And fourthly (on general demurrer), nor for not containing a formal averment of the defendant's suspension of payment,—because such suspension sufficiently appeared from the averment of the defendant's inability to pay his debts, followed by references in the plea to the "said suspension of payment."

Held also, fifthly, that the deed operated as a release, and was well pleaded as such; and that it was well pleaded in bar of the further maintenance of the action. *Phillips and Another v. Surridge*, 458

(See *Kingsford v. Dutton*, 479.)

5. To a declaration by drawer against acceptor of a bill of exchange, the defendant pleaded, that after the accruing of the causes of action, and before action brought, the defendant and plaintiff accounted together concerning the said causes of action, and concerning other claims and demands of the plaintiff against the defendant, and of the defendant against the plaintiff; that upon such accounting, a small sum, to wit, 50*l.*, was found due to the plaintiff by the defendant, which the defendant promised to pay; and that afterwards, and before action brought, the defendant paid plaintiff a large sum, to wit, 50*l.*, in full satisfaction and discharge of such sum so due to him.

Held, upon special demurrer, good plea. *Callander v. Howard*, 56

6. A declaration, after setting forth an agreement by which defendant took of plaintiff certain rooms, part of a messuage, and agreed to pay (without saying to whom) "the proportion of the rates," &c. "which might be assessed on the premises so taken" by him, averred, that afterwards, rates amounting, to wit, 150*l.*, were assessed on the messuage being the rates whereof the proportion was agreed to be paid as afore said; that such rates were afterwards assessed, became due, and were paid by the plaintiff; that the proper proportion payable by the defendant was a certain proportion to wit, one-third, amounting, to wit, 50*l.*, of all which defendant had notice, and was requested by the plaintiff to pay the said sum, nevertheless defendant disregarded, &c.

Pleas. First, as to 12*l.* 10*s.*, tender and payment into Court.

Secondly, as to residue, traversing the request to pay.

Fourthly, as to residue, that the proper proportion payable by defendant was a certain proportion amounting to 12*l.* 10*s.*, without this, that the proper proportion, was a certain proportion, to wit, one-third, amounting, to wit, to 50*l.*

Held, upon special demurrer to the second and fourth pleas,

First, that the defendant was bound to pay his proportion of the rates to the plaintiff.

Secondly, that his liability to do so was a primary, and not a collateral liability; and, therefore, that no request to pay was necessary.

Thirdly, that under the agreement to pay a proportion of the rates assessed on the premises so taken by him, he was bound to pay a proportion of the rates assessed on the messuage, of which such premises were a part. And

Fourthly, that the fourth plea was bad, as traversing only the precise amount of the proportion stated in

the declaration, which was immaterial. *Hooper v. Woolmer*, 634

7. By a deed executed by defendants, W. T., a bailiff, and two sureties, to plaintiff, the sheriff, the defendants covenanted to save harmless the plaintiff from any action brought against him "touching or concerning any matter wherein the said bailiff shall act or assume to act as bailiff," or "for or by reason of any extortion or escape happening by the act or default of the said bailiff." The plaintiff, in declaring on this, after stating an escape, alleged that it happened "by the default of the defendant W. T., and not otherwise, he the defendant W. T. then being bailiff of the said plaintiff as such sheriff." The defendants, after craving oyer of the deed, pleaded that the default "was not a default of him the said W. T., as such bailiff of the plaintiff."

Held, first, that the plea was bad on special demurrer, for ambiguity.

And secondly, that although the declaration was, *semble*, bad on special demurrer for not shewing that the default was a default of W. T. as bailiff, it was sufficient, after pleading over. *Cubitt and Another v. Thompson and Others*, 672

8. The declaration after alleging that plaintiffs were tenants of chambers to H., at the rent of 84*l.*, stated, that upon their letting the premises to defendant as their tenant, at the rent of 84*l.*, defendant promised to pay the said rent to H., or, if not, that he would indemnify plaintiffs in respect thereof, and would pay the same to them. Averment, that rent became due from plaintiffs to H., that defendant did not pay H., but plaintiffs paid him, and requested defendant to pay them, who refused, &c.

Plea, that before the same rent became due, it was agreed between C., one of the plaintiffs, on behalf of himself and his co-plaintiff, and defendant, that the latter should deliver

up the chambers to plaintiff C., and be discharged from further liability; and that possession was accepted accordingly.

Held, on demurrer, that the plea set up a good defence. *Smith and Another v. Lovell*, 794

PLEA TO THE FURTHER MAINTENANCE.

See PLEA, 1, 4.

PLEA ROLL.

See SUGGESTION.

PLEADING.

See ATTORNEY, 1.

DEBT.

DECLARATION.

FERRY, (CASE FOR DISTURBANCE OF).

JUDICIAL NOTICE.

MISJOINDER.

NAME.

NEW ASSIGNMENT.

PLEA.

PROHIBITION, 3.

REPLICATION.

PLEADING (TIME FOR).

See PRACTICE, 2.

POOR RATE.

See APPEAL, 1.

LIVERPOOL SANATORY ACT
(9 & 10 VICT. c. CXXVII).

POOR RATE, (BOND BY COLLECTOR OF).

See PUBLIC OFFICER.

DECLARATION, 5.

PRACTICE.

1. A rule for a certiorari to bring up the award of an assistant inclosure commissioner, under the 8 & 9 Vict. c. 118, s. 44, is a rule absolute in the first instance. *Ex parte Stephen Kelcey, Lord of the Manor of East Leigh*, 55

2. A defendant taking out a summons for time to plead, is entitled to the whole of the day on which such summons is dismissed, for the purpose of pleading, although the regular time had expired before such dismissal. *Evans v. Senior*, 170

3. Where a rule for a new trial upon payment of costs is granted, a rule to rescind that rule, upon the ground that the costs have not been paid, is, in the Common Pleas, a rule nisi only in the first instance. *Spear v. Ward*, 248

4. The rule that a party cannot shew cause unless he takes office copies of the affidavits on which the rule has been obtained, applies equally to a rule for an attachment as to any other proceeding. *Regina v. Carttar*, 274

5. After notice of trial given, the defendant's attorney died, and the plaintiff, not being aware of the fact, went to trial, and obtained a verdict and judgment, and sued out execution, under which the defendant was detained in custody. The Court refused to set aside the proceedings, or to discharge the defendant out of custody; as it did not appear but that the defendant knew of the attorney's death at the time it occurred, and had withheld that knowledge from the plaintiff. *Ashley v. Brown*, 451

PRECEDENT CONDITION,

See LANDS CLAUSES CONSOLIDATION ACT, 2.

PRISONER.

See ARREST (JUDGE'S ORDER TO, UNDER 1 & 2 VICT. c. 110).
BANKRUPTCY LAW CONSOLIDATION ACT, 3.
COUNTY COURT, 1, 2, 3, 7, 8.
DEPOSITIONS (COPIES OF).
HABEAS CORPUS
HUSBAND AND WIFE.
INSOLVENT DEBTOR, 1, 3.

PROHIBITION.

PRISON (KEEPER OF).

See INSOLVENT DEBTOR, 3.

PRIVY COUNCIL OFFICE (CLERK IN).

See COSTS (SUGGESTION TO DEPRIVE PLAINTIFF OF), 14.

PROBATE.

See PLEA, 1.

PROCEEDINGS (STAY OF).

See BAIL.

ESCAPE.

JOINT STOCK COMPANIES WINDING-UP ACT.

PROHIBITION.

See PETTY BAG OFFICE.

1. A summons, dated 3rd of January, 1850, was served upon the defendant, requiring him to appear before the County Court on the 25th of January. The defendant resided out of the jurisdiction of the County Court; but an order of the Judge of the County Court, dated the 30th of October, 1847, and made under the 60th section of the County Courts Act, was also served upon him at the same time, granting leave for the summons to issue. It did not appear whether any plaint had been entered in the County Court previously to that order being made. On the 19th of January, 1850, the defendant gave notice to the clerk of the County Court of his intention to rely at the trial upon the Statute of Limitations. *Held*, on motion for a prohibition, that whether the order in 1847 was a valid order, justifying the issuing the summons in 1850 or not, the defendant by appearing and pleading to the process, which brought him into Court, had waived all objections to its validity. *In re a Plaint or Suit in the County Court of Cardiganshire, between David Jones and Richard James*, 65

2. A plaint in the County Court for 20*l.* damages was removed by

certiorari into the superior Court. Another plaint, including the same cause of action, but laying the damage at 5*l.*, was then immediately entered. *Held*, that the pendency of the first action in the superior Court was no ground for issuing a prohibition in the second to the second in the County Court. *In re a Plaint or Suit in the County Court of Montgomeryshire, between Edward Edwards and John Rogers*, 196

3. Where it does not appear upon the face of the pleadings that the title is in question, the Judge of the County Court has jurisdiction to inquire whether it is so or not; but his decision on the point is open to revision in one of the superior Courts on motion for a prohibition on affidavit, and if that Court direct that the party shall declare, the question becomes one of evidence.

Prohibition. The declaration stated a plaint in the County Court by B. against T., for use and occupation; that T. protested that the title of the land was in question: that it was in truth in question: but that the Judge proceeded. The plea stated that on T.'s protesting that the title was in question, B. denied it: that the Judge heard evidence and arguments, and decided that the title was not in question, and did proceed to hear the case; and that on the hearing, neither party adduced any evidence or argument other than those which they adduced before: *Held*, on general demurrer, that the plea was bad; either because it admitted the statement in the declaration, that, in fact, the title was in question, in which case the Judge had no jurisdiction under the 9 & 10 Vict. c. 95, s. 58; or not admitting that statement, it denied that it could be permitted to be made by reason of the decision of the County Court Judge that the title was not in question, being final and not subject to be reviewed by this Court. *Thompson v. Ingham and Batty*, 216

4. A prohibition will go to a County Court after the high bailiff has seized the goods of the defendant in execution upon the judgment, and while they are still in hand, *semble*.

The plaintiff entered two plaints in the County Court, one for 19*l.* 19*s.* for goods sold and delivered, work and labour, and money paid; the other for 19*l.* for money lent. The particulars annexed to the first consisted of items from November 1845, to the 12th of July, 1849, amounting together to 27*l.* which sum was reduced to the amount above mentioned by a set-off,—which, however, was not stated to have been allowed by the defendant. The particulars of the second plaint consisted of three items, from April, 1846 to the 14th of July, 1849. The plaintiff recovered judgment in the first cause for 17*l.*; in the second for 19*l.* *Held*, upon motion for a prohibition,

First, that the items in the two plaints were not so connected as to form one cause of action, although they might have been recovered under one count,

Secondly, that it did not appear that the County Court had exceeded its jurisdiction in trying the first plaint, as the affidavits in support of the rule for a prohibition did not shew either that the set-off had been resorted to, in the course of the trial, to reduce the plaintiff's demand, or that, if so resorted to, it was not proved that the defendant had not allowed it, or that he had refused to allow, it during the trial. *In re Kimpton v. Willey*, 280

5. If, on the face of a plaint in the County Court, the subject-matter stated is clearly within its jurisdiction; this Court will not interfere to review the decision of the Judge, where the fact on which his jurisdiction depends, rests upon conflicting evidence. *Joseph v. Henry*, 388

6. The summons in a plaint in the County Court stated that the sum

sued for was 20*l.* ; but the particulars stated, that the plaint was issued to recover 20*l.*, under the Apothecaries' Act, 55 Geo. 3, c. 194, (sect. 20 of which imposes a penalty of 20*l.* upon every uncertificated person practising as an apothecary), and stated four occasions on which the defendant had practised. *Held*, upon motion for a prohibition, that the amount recoverable was limited by the sum named in the summons and particulars, and, therefore, that the County Court had jurisdiction. *In the matter of the Apothecaries' Company v. Burt*, 405

7. Where a writ of prohibition was issued out of the Petty Bag Office of the Court of Chancery in Vacation, upon an ex parte affidavit, without leave of the Court or a Judge, and disclosed no sufficient ground of prohibition on the face of it, this Court set it aside on motion, under the 12 & 13 Vict. c. 109, s. 39. *In re a Plaint, &c., in the County Court of Surrey, between Still and Booth*, 440

8. After recovery of judgment for a debt against a defendant in a County Court, he petitioned for and obtained his discharge under the Insolvent Act, and inserted the debt in his schedule. On a judgment summons before the County Court, under the 9 & 10 Vict. c. 95, s. 60, he pleaded his discharge; but the County Court Judge, notwithstanding, made an order for payment of the debt by instalments, and afterwards, on default, for his committal to prison: *Held*, that although the defendant, who had been imprisoned, might be entitled to his discharge, it was at most an error in the exercise of his powers on the part of the County Court Judge, and not an excess of jurisdiction, and that, therefore, prohibition would not lie. *Id.*, 440

9. A summons had been served to answer a plaint in the County Court in the nature of an action on the case for an injury to the plaintiff's rever-

sionary interest in land. The injury complained of, as set forth in the particulars, was the removal of a boundary fence between the lands of the plaintiff and the defendant, cutting down trees, &c., and the erection of a new fence, in such a manner as to make it appear that a certain portion of the plaintiff's land belonged to the defendant. *Held*, that the defendant, upon shewing that the title to land was bona fide in dispute, was entitled to a prohibition, and that he was not bound to wait till the County Court had proceeded to hear the case.

The question which the Court in such a case has to inquire into, is not whether the title set up by the defendant is good, but whether there exists a bona fide dispute as to the title. *In re a Plaint or Suit in the County Court of Suffolk, between Decimus Sewell and William Jones*, 525

PROLIXITY.

See JUDICIAL NOTICE.

NAME.

PLEA, 4.

PROOF OF DEBT BEFORE MASTER.

See JOINT STOCK COMPANIES WINDING-UP ACT.

PROTECTION FROM ARREST.

See BANKRUPTCY LAW CONSOLIDATION ACT, 3.

HUSBAND AND WIFE.

INSOLVENT DEBTOR, 2.

PROVISIONAL COMMITTEEMAN.

See JOINT STOCK COMPANIES WINDING-UP ACT, 1.

NONSUIT (JUDGMENT AS IN CASE OF A, 3

RATES, &c.

PROVISO IN STATUTE.

See **USURY.**

PUBLIC OFFICER.

See **BANKING COMPANY.**

COMPANIES CLAUSES CONSOLIDATION ACT, 2.

SUGGESTION.

An act of Parliament, after appointing a number of persons guardians of the poor of a parish, and declaring that seven should be a quorum, enacted, that the guardians should sue and be sued in the name of their treasurer; and that no action that might be brought by them or any of them in the name of the treasurer, should abate, &c.

A bond for the due performance of a poor rate collector's duties having been executed to seven of the guardians, *Held* that an action upon the bond was well brought in the name of the treasurer. *Kingsford v. Dutton*, 479

PUIS DARREIN CONTINUANCE.

See **PATENT.**

QUEEN'S PRISON.

See **INSOLVENT DEBTOR, 1.**

RAILWAY COMPANY.

See **COMPANIES CLAUSES CONSOLIDATION ACT.**

DECLARATION, 2, 3.

EXECUTION.

JOINT STOCK COMPANIES WINDING-UP ACT, 1.

LANDS CLAUSES CONSOLIDATION ACT (REFERENCE UNDER).

RATE PAYERS.

See **JUDICIAL NOTICE.**

RATES (PAYMENT OF PROPORTION OF).

See **PLEA, 6.**

REMOVAL (ORDER OF). 867

RE-ADMISSION OF ATTORNEY.

See **ATTORNEY (CERTIFICATE OF).**

REASONABLE TIME.

See **AFFIDAVIT, 3.**

DECLARATION, 5.

RECOGNIZANCES.

See **APPEAL, 2.**

BAIL.

CERTIORARI, 2.

RECORD.

See **REPLICATION, 2.**

TRIAL BY RECORD.

RECORD (WITHDRAWAL OF).

See **COSTS (OF THE DAY), 1, 2.**

SPECIAL JURY, 2.

REFERENCE.

See **ARBITRATION.**

LANDS CLAUSES CONSOLIDATION ACT (REFERENCE UNDER).

RULE OF COURT (MAKING ORDER OF INFERIOR COURT).

RELEASE.

See **PLEA, 4.**

ARBITRATION, 1.

REMIT, (POWER TO, FOR RECONSIDERATION OF ARBITRATOR).

See **ARBITRATION, 7, 9.**

REMOVAL (ORDER OF).

See **APPEAL, 3.**

1. A rule of practice at sessions, that when an order of removal is quashed upon appeal only 40s. shall be allowed for the appellants' costs, is bad; and if the sessions act upon such a rule, this Court will grant a mandamus commanding them to consider the question of costs in the

particular case, and to award to the appellants such costs as they in their discretion shall think reasonable and just. *Regina v. Justices of Glamorganshire*, 336

2. A notice of appeal against an order of removal may be given by the attorney of the overseers on their behalf.

Unless an objection to a notice of appeal be distinctly raised at the sessions, a party cannot avail himself of it on an application to this Court for a mandamus. *Regina v. Justices of Middlesex*, 621

REPLICATION.

See COUNTY COURT, 6.
SET-OFF.

1. To a declaration by indorsee against acceptors of two bills, defendants pleaded that the bills were accepted by them and B., and not by defendants alone; that at the time when the bills became due they still were in the hands of M. and Sons, the drawers, and continued in their hands till the agreement after mentioned; that on, &c., it was agreed, that in consideration of defendants and B. paying M. and Sons 500*l.* in settlement of certain accounts, M. and Sons should accept a dividend of 2*s.* 9*d.* in the pound on certain acceptances of defendants and B., (including those sued upon), and to deliver up such acceptances within a month, the defendants to pay the composition within a month, or to tender it at O.; and that the party making default in observing the agreement should forfeit 500*l.* That defendants and B. accordingly paid M. and Sons 500*l.*, and were ready to pay the composition, and tendered the same at O. Averment, that M. and Sons would not accept the dividend nor deliver up the acceptances, but afterwards delivered them to the plaintiff, who received them with notice.

Replication, *de injuriâ*.

Held, on special demurrer, that the replication was good.

The defendants pleaded another plea, similar to the above one, except that the agreement was alleged to have been made between plaintiff through M. and Sons as his agent and defendants and B.

Replication, that it was not agreed between plaintiff, through M. and Sons as his agents, and defendant *modo et formâ*.

Held, that although the violation of the agreement by plaintiff made plaintiff liable to pay the penalty 500*l.*, it was no answer to the present action, and therefore, that the plea was bad.

Whether the replication was too narrow for traversing the agreement between plaintiff and defendants only, and not between the plaintiff and defendant and B., *quære*.

Whether it was not also bad for duplicity, for putting in issue not only the agreement, but also the agency through which it was alleged to have been effected, *quære*. *Bulgeig v. Booker and Others*, 4

2. To a declaration in debt, the defendant pleaded that he was an attorney of the Court of Queen's Bench without averring that he was not attorney of this Court. The plaintiff replied that defendant was an attorney of this Court, concluding with verification by the record, and prayer of inspection of the record. Upon motion for judgment, *Held*, that the plaintiff was entitled to judgment although there was no issue joined upon the pleadings. *The Staffordshire Railway Company v. Smith*, 5

3. The first count of the declaration, after alleging that plaintiffs were tenants of chambers to H., the rent of 84*l.*, stated, that upon their letting those chambers to defendant as their tenant at the rent of 84*l.*, defendant promised to pay the said rent to H., or, if not, that he would indemnify plaintiffs

respect thereof, and would pay the same to them. Averment, that rent became due from plaintiffs to H., that defendant did not pay H., but plaintiffs paid him, and requested defendant to pay them, who refused, &c.

Sixth plea, that before the rent grew due from plaintiffs to H., defendant's tenancy ended by operation of law, by his delivering up possession to plaintiff C.

Replication, that defendant of his own wrong delivered up possession; because it had been agreed, that if plaintiffs gave defendant notice to determine the agreement between them and defendant, they would not prevent his becoming tenant to H., and had not prevented him; that plaintiffs received possession of the chambers from defendant for the purpose of letting them for him; that they refused to accept possession except upon the terms that defendant should not be released from his liability, and that possession was taken on no other terms. Without this, that the term was surrendered by operation of law, &c.

Held, upon special demurrer, that the replication was bad, on the ground that the inducement was inconsistent and incongruous with the traverse. *Smith and Another v. Lovell*, 794

4. Seventh plea, that before the same rent became due, it was agreed between C., one of the plaintiffs, on behalf of himself and his co-plaintiffs, and defendant, that the latter should deliver up the chambers to plaintiff C., and be discharged from further liability; and that possession was accepted accordingly.

Replication, traversing that it was agreed between plaintiff C. on behalf of himself and his co-plaintiff and defendant, that defendant should be discharged from further liability, and that possession was accepted accordingly.

Held, on special demurrer, first,

that the seventh plea set up a good defence.

Secondly, that the replication was too large, for traversing not only that the agreement was made by C., but also that it was made by him on behalf of himself and his co-plaintiff.

Thirdly, that this was an objection of substance, and available upon general demurrer.

Whether the seventh plea was not double and multifarious for denying the acceptance of possession as well as the agreement, *quere*.

Ibid.

5. Eighth plea to the same declaration, that before the same rent became due, plaintiff C., with the sanction of his co-plaintiff, evicted defendant.

Replication, traversing eviction by C., with the sanction of his co-plaintiff.

Held, that the replication was too large. *Ibid*.

6. The same declaration contained a second count for use and occupation; and a third upon an account stated.

Eleventh plea, to those counts, that after the causes of action accrued, defendant was discharged by order of the Insolvent Debtors' Court.

Replication, as to so much of the plea as relates to the third count, that the cause of action accrued after the order.

Held, that the replication was bad, as amounting to an argumentative traverse of the plea. *Ibid*.

REQUEST.

See PLEA, 6.

RESIDENCE OF PLAINTIFF AND DEFENDANT.

See COSTS (SUGGESTION TO DEPRIVE PLAINTIFF OF), 1, 7, 8, 12, 18.

870 RULE OF COURT, &c.

RETURN OF NULLA BONA.

See EXECUTION, 1

REVERSIONER (ACTION ON THE CASE BY).

See DECLARATION, 1.
PROHIBITION, 9,

RIGHT OF WAY.

See DECLARATION, 1.

ROLL.

See ATTORNEY (NAME OF).

ROYAL PECULIAR.

See PLEA, 1.

RULE FOR PAYMENT OF MONEY (UNDER 1 & 2 VICT. c. 110, s. 18).

See ARBITRATION, 11.

LANDS CLAUSES CONSOLIDATION ACT, (REFERENCE UNDER), 2.

Semble, that the 18th section of the 1 & 2 Vict. c. 110, has not given the Courts power to make orders in cases in which it was not their practice to make any before the passing of that act; but has only given to orders for paying money, made in their ordinary practice, the effect of judgments.

But even if they have the power of making such orders, they will not exercise it except in cases where they would grant an attachment. *Creswick v. Harrison*, 721

RULE OF COURT (MAKING ORDER OF INFERIOR COURT).

See ARBITRATION, 3.

Where an order of reference made by a borough Court of record by consent, contained a clause that it might be made a rule of this Court, and the consent of the parties was

SATISFACTION, &c.

also verified by affidavit, this Court, upon motion, directed it to be made a rule of Court. *Harlow v. Winstanley*, 425

RULE OF COURT (UNDER 11 & 12 VICT. c. 44, s. 5).

The remedy by rule under 11 & 12 Vict. c. 44, s. 5, is not simply for the benefit of justices, and confined to cases in which their jurisdiction is doubtful; but extends to all cases in which they refuse to do an act relating to the duties of their office. *Reg. v. Aston*, 491

RULE OF COURT (UNDER THE 12 & 13 VICT. c. 45, s. 18).

1. The proper mode of removing an order of sessions into this Court, in order to enforce it, under the 12 & 13 Vict. c. 45, s. 18, is by writ of certiorari. *Regina v. The Justices of Devonshire*, 520

[But see the following case].—

2. In order to remove into this Court an order of quarter sessions for the purpose of enforcing it under the 12 & 13 Vict. c. 45, s. 18, it is not necessary that a writ of certiorari should issue; the simple order of this Court being sufficient for that purpose. *Hawker, Appellant, v. Field, Respondent*, 606

RULE TO COMPUTE (SERVICE OF).

See SERVICE OF RULE TO COMPUTE.

SANATORY ACT.

See LIVERPOOL SANATORY ACT (9 & 10 VICT. c. CXXVII).

SATISFACTION AND DISCHARGE.

See PLEA, 5.

SERVICE.

SATISFACTION (EXECUTION UNDER CA. SA. HOW FAR SATISFACTION OF DEBT).

See BANKRUPTCY LAW CONSOLIDATION ACT, 4.

SCANDALOUS MATTER.

See AFFIDAVIT, 1.

SCIRE FACIAS.

See EXECUTION.
PATENT.

SCOTCH RAILWAY COMPANY.

See COMPANIES CLAUSES CONSOLIDATION ACT, 2.

SECOND ACTION.

See PROHIBITION, 2.

SECOND APPLICATION.

See ARREST (JUDGE'S ORDER TO, UNDER 1 & 2 VICT. C. 110).
COSTS (SUGGESTION TO DEPRIVE PLAINTIFF OF) 15.

When a Judge at Chambers dismisses a summons upon the ground of the insufficiency of the affidavits in support of it, the party applying cannot, in renewing his application to the Court, use fresh affidavits.
Hawkins v. Akrill, 242

SECRETARY OF RAILWAY COMPANY.

See COMPANIES CLAUSES CONSOLIDATION ACT, 2.

SECURITY FOR COSTS.

See COSTS (SECURITY FOR).

SEPARABLE MATTER.

See ARBITRATION, 1, 4, 7.
LANDS CLAUSES CONSOLIDATION ACT, (REFERENCE UNDER), 2.

SERVICE.

See AUDITA QUERELA.

SET-OFF.

871

SERVICE.

See BASTARDY (ORDER IN), 1, 3.
COMPANIES CLAUSES CONSOLIDATION ACT, 2.

SERVANT (ACTION FOR DISCHARGING).

See PLEA, 3.

SERVICE OF RULE TO COMPUTE.

Service of a rule to compute principal and interest in an action on a bill of exchange on a clerk at the defendant's warehouse, is insufficient.
Medlicott v. Williams, 709

SERVICE OF WRIT OF SUMMONS ABROAD.

Service of a writ of summons abroad is an irregularity only, and not a nullity.

Where, therefore, a defendant resident at Boulogne, was served there with a writ of summons on the 13th of September, an appearance was entered for him on the 24th of October, and the declaration was served by leave of a Judge, by sending it on the 25th through the post;

Held, that an application made on the 14th of November to set aside the writ and other proceedings, was too late; even though the subsequent proceedings were taken under affidavits which suppressed the fact that service had been effected abroad.
Minet v. Round, 654

SESSIONS.

See APPEAL.

REMOVAL (ORDER OF).
RULE OF COURT (UNDER THE 12 & 13 VICT. C. 45, S. 18).

SET-OFF.

See ATTORNEY (LIEN OF).
COUNTY COURT, 6.
PROHIBITION, 4.

Assumpsit on a money demand against a joint stock banking com-

pany. Plea, (after setting out the deed of settlement, to which the plaintiff was a party), a set-off for calls due on shares held by the plaintiff. Replication, "not indebted:" *Held*, that the replication was bad; the set-off being founded entirely on the deed. *Held* also, that the plea was good. *Henry Milvain v. Joseph Mather, P. O., &c.*, 220

SETTING ASIDE PROCEEDINGS.

See COSTS (CERTIFICATE UNDER 43 ELIZ. C. 6).
COSTS (SUGGESTION TO DEPRIVE PLAINTIFF OF), 4, 5, 17.
PRACTICE, 5.
SERVICE OF WRIT OF SUMMONS ABROAD.

SEVERAL DEFENDANTS (INDICTMENT AGAINST).

See CERTIORARI, 2.

SEVERAL DEFENDANTS (CHANGING VENUE BY ONE OF).

See VENUE, 1.

SEVERAL ISSUES.

See COSTS, 1, 2.

SHAREHOLDER.

See DECLARATION, 2.
EXECUTION.
JOINT STOCK COMPANIES WINDING-UP ACT.
SET-OFF.

SHERIFF.

See DECLARATION, 7, 8.
ESCAPE.
TITHE COMMUTATION ACT (COSTS OF INQUISITION UNDER).

SPECIAL JURY.

See COSTS, 3.

1. After the cause had been set

down for trial, the defendant obtained a special jury rule. The plaintiff attended at the nomination of the jury, but on the same day obtained an order from the Judge at nisi prius, that the cause should be tried in its order by a common jury, unless a special one was first struck. The cause was tried accordingly, no special jury having been struck.

Held, that the cause had been properly tried: as a special jury rule does not deprive a party of his right to the common jury process, until a special jury has been struck; and that the plaintiff's attendance at the nomination—a proceeding which he could not prevent—had not made the special jury rule binding on him. *Dawson and Another v. Smith*, 151

2. Where at nisi prius the record is withdrawn, by leave of the Judge, for the purpose of making an amendment, which is accordingly made, it is not a new, but an amended issue. Therefore, where a special jury had been struck, the Court refused an application to try it by a common jury. *Skinner v. The London, Brighton, and South Coast Railway Company*, 191

SPECIFICATION.

See PATENT.

SPLITTING DEMANDS.

See COUNTY COURT, 5.
PROHIBITION, 4.

STAMP.

See ARBITRATION, 3.

STATEMENT OF GROUNDS OF APPEAL.

See APPEAL, 1, 3.

STATUTES (CONSTRUCTION OF).

6 EDW. 1, c. 1, s. 2.

See COSTS, 1, 2.

29 ELIZ. c. 4.

See DECLARATION, 7.

43 ELIZ. c. 6, s. 2.

See COSTS (CERTIFICATE UNDER
43 ELIZ. c. 6, s. 2).

5 & 6 WM. & MARY, c. 11.

See BAIL.

4 ANN. c. 16, s. 5.

See COSTS, 1, 2.

————— s. 27.

See TENANT IN COMMON.

12 ANN. STAT. 2, c. 16.

See USURY.

9 GEO. 1, c. 7, s. 8.

See REMOVAL (ORDER OF), 2.

54 GEO. 3, c. CXIII.

See PUBLIC OFFICER.

55 GEO. 3, c. 194, s. 20 (APO-
THECARIES' ACT).

See PROHIBITION, 6.

6 GEO. 4, c. 50, s. 30.

See SPECIAL JURY, 1.

6 GEO. 4, c. 129, s. 12.

See APPEAL, 2.

7 GEO. 4, c. 46, s. 9.

See BANKING COMPANY.
SUGGESTION.

————— s. 13.

See EXECUTION, 3.

2 WM. 4, c. 39, s. 13.

See COMPANIES CLAUSES CON-
SOLIDATION ACT, 2.

3 & 4 WM. 4, c. 67, s. 2.

See OUTLAWRY (PROCEEDINGS IN).

4 & 5 WM. 4, c. 76, s. 82.

See REMOVAL (ORDER OF), 1.

5 & 6 WM. 4, c. 83, ss. 1 & 5.

See PATENT.

6 & 7 WM. 4, c. 71.

See TITHE COMMUTATION ACT (COSTS
OF INQUISITION UNDER).

1 & 2 VICT. c. 110, ss. 3 & 6.

See ARREST, JUDGE'S ORDER TO
(UNDER 1 & 2 VICT. c. 110).

————— s. 14.

See ORDER TO CHARGE STOCK, 1.

————— s. 18.

See RULE FOR PAYMENT OF MONEY
UNDER.

————— ss. 40 & 90.

See BANKRUPTCY LAW CONSOLI-
DATION ACT, 4.

————— ss. 76, 77, 78,
85, 110.

See INSOLVENT DEBTOR, 3.

2 & 3 VICT. c. 37.

See USURY.

3 & 4 VICT. c. 82.

See ORDER TO CHARGE STOCK, 1.

5 & 6 VICT. c. 98, s. 31.

See ESCAPE.

5 & 6 VICT. c. 116, s. 10.

See INSOLVENT DEBTOR, 2.

6 & 7 VICT. c. 73, s. 25.
See ATTORNEY (CERTIFICATE OF).

7 & 8 VICT. c. 96, s. 22.
See INSOLVENT DEBTOR, 3.

7 & 8 VICT. c. 101, ss. 2, 3, 4.
See BASTARDY (ORDER IN).

8 & 9 VICT. c. 10, SCHED.
 No. 8.
See BASTARDY (ORDER IN), 1, 3.

8 & 9 VICT. c. 16, ss. 6 & 38.
See COMPANIES CLAUSES CONSOLIDATION ACT, 1.
 ————— s. 26.
See DECLARATION, 2.

8 & 9 VICT. c. 18, s. 25.
See LANDS CLAUSES CONSOLIDATION ACT (REFERENCE UNDER), 3.
 ————— s. 34.
See LANDS CLAUSES CONSOLIDATION ACT (REFERENCE UNDER), 1.

8 & 9 VICT. c. 118, s. 44.
See COMMONS INCLOSURE ACT. PRACTICE, 1.

9 & 10 VICT. c. 95, s. 60.
See COSTS (SUGGESTION TO DEPRIVE PLAINTIFF OF), 4.
 ————— s. 90,
See CERTIORARI, 1,
 ————— s. 91.
See ATTORNEY, 2, 3.
 ————— ss. 99 & 102.
See COUNTY COURT, 1.
 ————— s. 113.
See COUNTY COURT, 3.

9 & 10 VICT. c. cxxvii.
See LIVERPOOL SANATORY ACT.

11 & 12 VICT. c. 7, s. 2.
See INSOLVENT DEBTOR, 1.

11 & 12 VICT. c. 31, s. 9.
See APPEAL, 3.

11 & 12 VICT. c. 42, s. 27.
See DEPOSITIONS (COPIES OF).

11 & 12 VICT. c. 44, s. 5.
See DEPOSITIONS (COPIES OF).
 RULE OF COURT (UNDER 11 & 12 VICT. c. 44, s. 5).

11 & 12 VICT. c. 45, s. 73.
See JOINT STOCK COMPANIES WINDING-UP ACT.
 NONSUIT (JUDGMENT AS IN CASE OF A), 3.

12 & 13 VICT. c. 45, s. 18.
See RULE OF COURT (UNDER 12 & 13 VICT. c. 45, s. 18).

12 & 13 VICT. c. 106, s. 86.
See BANKRUPTCY LAW CONSOLIDATION ACT, 5.
 ————— s. 112.
See HUSBAND AND WIFE.
 ————— s. 137.
See BANKRUPTCY LAW CONSOLIDATION ACT, 2.
 ————— s. 211.
See BANKRUPTCY LAW CONSOLIDATION ACT, 3.
 ————— ss. 224, 225.
See BANKRUPTCY LAW CONSOLIDATION ACT, 4.
 PLEA, 1.
 ————— ss. 257, 259.
See BANKRUPTCY LAW CONSOLIDATION ACT, 4.

SUGGESTION.

12 & 13 VICT. c. 109, s. 39.

See PROHIBITION, 7.

———— s. 44.

See PETTY BAG OFFICE.

STATUTE OF LIMITATIONS.

See ATTORNEY, 1.

PROHIBITION, 1.

WRIT OF SUMMONS (AMENDMENT OF).

STAYING OF PROCEEDINGS.

See BAIL.

ESCAPE.

JOINT STOCK COMPANIES WINDING-UP ACT.

Where a plaintiff sued in a superior Court for 9*l.* 10*s.*, and the defendant pleaded, except as to 8*l.* 14*s.* 6*d.*, never indebted, and to that sum a tender, and the jury found for the plaintiff on the first issue to the extent of 16*s.*, and for the defendant on the plea of tender, the Court refused to stay the proceedings as in an action brought for a sum under 40*s.*; but left the plaintiff to enter a suggestion under the County Courts' Act (9 & 10 Vict. c. 95, s. 129). *Nurdin v. Fairbanks*, 617

STEP (COLLATERAL TO CAUSE).

See PAUPER PLAINTIFF, 2.

STOCK (ORDER TO CHARGE).

See ORDER TO CHARGE STOCK.

SUBMISSION.

See ARBITRATION.

LANDS CLAUSES CONSOLIDATION ACT (REFERENCE UNDER).

SUGGESTION.

See COSTS (SUGGESTION TO DEPRIVE PLAINTIFF OF).

DEATH OF ONE OF SEVERAL PLAINTIFFS.

SUMMARY JURISDICTION. 875

After the issue was delivered in an action by a joint stock company in the name of their public officer, the latter died, and another officer was appointed in his place; upon which the plaintiff entered, immediately after the jurata clause, a suggestion upon the nisi prius record in the following form:—"Before which last mentioned day, &c., the said J. T. died, and T. B. was appointed public officer in his place. Thereupon the suit so commenced by J. T. is further continued by T. B. Therefore, &c." The cause was entered on the commission day with the Marshal, in the name of the new officer, and upon the same day the defendants' attorney was served with a notice of the death of the old, and the appointment of the new officer, and of the entry of the suggestion: but the latter was not served or filed. The cause was tried in the name of the new officer, some of the defendants appearing and protesting, others not appearing.

Held, that as the suggestion was entered without the authority of the Court, and without any opportunity being given to the defendants to traverse the facts stated, and as it did not state any matter, excluding the defendants' right to do so—such as follows a suggestion which the opposite party is not allowed to traverse,—it was entered irregularly, and did not authorize the trial of the cause in the name of the new public officer.

Semble, the suggestion ought to have been entered on the plea roll.

Whether such suggestion, if properly entered, is traversable, *quare*?

If traversable, whether the time between the 10th of August and the 24th of October is to be excluded from the defendants' time to plead, *quare*? *Barnewall, P. O., v. Sutherland and Others*, 159

SUMMARY JURISDICTION.

See ATTORNEY, 1.

876 TENANT IN COMMON.

SUMMONS.

See BASTARDY (ORDER IN), 3.

SUMMONS (SERVICE OF WRIT OF).

See COMPANIES CLAUSES CONSOLIDATION ACT, 2.

SERVICE OF WRIT OF SUMMONS ABROAD.

SURETIES.

See PLEA, 7.

SURPLUSAGE.

See ARBITRATION, 1, 7.

DECLARATION, 3.

DEBT.

PLEA, 3.

LANDS CLAUSES CONSOLIDATION ACT (REFERENCE UNDER), 2.

SURREJOINDER.

See ATTORNEY, 1.

SURRENDER IN LAW.

See REPLICATION, 3.

SUSPENSION OF JUDGMENT.

See APPEAL, 2.

SUSPENSION OF PAYMENT (STATEMENT OF, IN PLEADING).

See PLEA, 4.

TAXATION OF COSTS.

See ARBITRATION, 5, 6, 10.

COSTS (CERTIFICATE UNDER 4 ANN. C. 16).

TITHE COMMUTATION ACT (COSTS OF INQUISITION UNDER).

TENANT IN COMMON.

An action for money had and received by one tenant in common against his co-tenant, for receiving more than his portion of the rents,

TITHE COMMUTATION ACT, &c.

will not lie. The remedy is by action of account, under 4 Ann. c. 16, s. 27. *Thomas v. Thomas*, 229

TENANT (LANDLORD AND.)

See DECLARATION, 9.

PLEA, 6, 8.

REPLICATION, 3, 4, 5, 6.

TENDER (OF CONVEYANCE).

See LANDS CLAUSES CONSOLIDATION ACT (REFERENCE UNDER), 2.

TESTAMENTARY LETTERS.

See PLEA, 1.

"THEREFORE."

See COUNTY COURT, 3.

TIME.

See PRACTICE, 2.

SERVICE OF WRIT OF SUMMONS ABROAD.

SUGGESTION.

TRIAL BY RECORD, 1.

TITHE COMMUTATION ACT (COSTS OF INQUISITION UNDER).

A writ having issued to the sheriff by order of a Judge, under sect. 82 of the Tithe Commutation Act (6 & 7 Wm. 4, c. 71), requiring him to summon a jury and assess the arrears of a rent-charge, and return the inquisition, the sheriff took the inquisition. In the following Term, the tenant of the land obtained a rule nisi to set aside the Judge's order and proceedings under it. That rule being discharged, the Master, in taxing the costs of the inquisition, included in his allocatur such costs as were incurred by the owner of the rent-charge after the inquisition had been taken, in resisting the rule to set aside the order. *Held* (dissentiente *Parke*, B.), that such costs were properly allowed by the Master

TRESPASS.

as "costs of such inquisition." *In re the Hammersmith Rent-Charge Allotments*, 1364 and 1365, 578

TITLE OF AFFIDAVIT.

See DEATH OF ONE OF SEVERAL PLAINTIFFS.

TITLE OF ORDER.

See ORDER TO CHARGE STOCK, 1.

TITLE OF PATENT.

See PATENT.

TITLE TO LAND IN QUESTION.

See PROHIBITION, 3, 9.

TRANSCRIPT OF RECORD.

See PATENT.

TRADER.

See BANKRUPTCY LAW CONSOLIDATION ACT.
PLEA, 4.

TRAVERSE (SPECIAL).

See PLEA, 3, 6.
REPLICATION, 3.

TRAVERSE (TOO LARGE).

See REPLICATION, 4, 5,

TRAVERSE (ARGUMENTATIVE).

See REPLICATION, 6.

TRAVERSE (TOO NARROW).

See REPLICATION, 1.

TREASURER.

See PUBLIC OFFICER.

TRESPASS.

See NEW ASSIGNMENT.

UNCERTAINTY, &c. 877

TRIAL.

See NOTICE OF TRIAL.
PRACTICE, 5.
SPECIAL JURY, 2.

TRIAL AT BAR.

The Court refused to grant a trial at bar on the motion of the plaintiff, on either of the three following grounds. First, that the defendant was Lord Chancellor; second, that the plaintiff was an attorney of the Court in which the action is brought; third, that a question would arise in the cause, whether the Lord Chancellor could hear and determine a suit in favour of a corporation of which he was a member, and in which suit he had a pecuniary interest. *Dimes v. Lord Cottenham*, 318

TRIAL BY RECORD.

See REPLICATION, 2.

1. Two days' notice of a trial by the record is sufficient, where the party, giving the notice, is the party producing the record. *Hopkin v. Daggett*, 541

2. Upon an issue of nul tiel record, the Court refused to give judgment, where the dies datus clause was omitted from the record. *Aylward v. Garrett*, 750

TRUSTEE.

See COSTS (SECURITY FOR).

UMPIRE.

See ARBITRATION, 1, 2, 13.
LANDS CLAUSES CONSOLIDATION ACT, 1.

UNCERTAINTY IN DESCRIPTION OF OFFENCE.

See COUNTY COURT, 1, 2, 3.

878 VACATION, &c.

UNCERTAINTY.

See DECLARATION, 7.

UNDERTAKING, PEREMP-
TORY.

See DEATH OF ONE OF SEVERAL
PLAINTIFFS.

NONSUIT (JUDGMENT AS IN CASE
OF A), 4.

UNDERTAKING TO GIVE MA-
TERIAL EVIDENCE.

See VENUE, 2.

USURY.

A plea of usury stated that it was "corruptly and against the form of the statute" agreed between plaintiff and defendant, that plaintiff should advance to defendant, as he should require, sums not exceeding 1000*l.*, by cashing defendant's cheques, and that plaintiff should charge at the rate of 10*l.* per cent. as interest, and under the colour of commission: it then averred that the money was advanced, and the usurious interest was so charged.

Held good on special demurrer, though it stated only the gross sum payable for interest and commission, without alleging how much was attributable to each, it being averred that the agreement was made colourably to enable the plaintiff to take more than 5*l.* per cent.

In pleading usury it is sufficient to allege that it was "corruptly and against the form of the statute" agreed, so as to bring the case within 12 Anne, stat. 2, c. 16, and it is unnecessary to allege that it is not taken out of the operation of that act by 2 & 3 Vict. c. 37. *Derry, Public Officer of the Devon and Cornwall Banking Company v. Toll*, 589

VACATION (PLEADING
DURING).

See SUGGESTION.

VERDICT, &c.

VALUATION IN POOR RATI

See LIVERPOOL SANATORY ACT (9
10 VICT. C. CXXVII).

VARIANCE.

See COSTS OF THE DAY, 1.

VENIRE FACIAS.

See AUDITA QUERELA.

VENUE.

1. One of several defendants to change the venue in an action up the usual affidavit, unless from special circumstances manifest injustice would be done by that step.

Where, therefore, one of two defendants changed the venue on the usual affidavit, the Court refused, the motion of the plaintiff to set aside the rule for that purpose, although the other defendant swore that he had not given his consent, and that if had been asked he would have refused to give it. *Job v. Butterfield and Another*, 7

2. The plaintiff laid the venue London, believing that he could give material evidence there. The defendant having changed it to a county where the cause of action arose, the Court allowed the plaintiff before plea pleaded, to amend the declaration, by changing the venue to a county in which the plaintiff could undertake to give material evidence.

The venue, as thus amended, regarded as the original venue, *quo* the defendant's right to change upon the common affidavit. *Coleman v. Foster*, 71

VERBAL NOTICE.

See BASTARDY (ORDER IN), 2.

VERDICT (POWER TO
ENTER).

See ARBITRATION, 8.

WINDING-UP ACT.

WAIVER.

See ARBITRATION, 1, 2, 6, 8.

PROHIBITION, 1.

SPECIAL JURY, 1.

WAREHOUSE.

See SERVICE OF RULE TO COMPUTE.

WARRANT OF COMMITMENT.

See COUNTY COURT, 1, 2, 3, 8.

WARRANT OF INSOLVENT COURT.

See INSOLVENT DEBTOR, 3.

WARRANT (OBEDIENCE TO).

A messenger of the Court of Bankruptcy, who acting under a warrant to take the goods of A. takes the goods of B., is not protected by the 107th section of the Bankrupt Law Consolidation Act, although he acted bonâ fide and in the reasonable belief that he was acting in obedience to his warrant. *Munday v. Stubbs*, 675

"WAS AND STILL IS."

See DECLARATION, 3.

"WHEREBY," "WHEREUPON."

See DECLARATION, 1.

WIFE.

See HUSBAND AND WIFE.

WINDING-UP ACT.

See JOINT STOCK COMPANIES WINDING-UP ACT.

WRIT OF SUMMONS, &c. 879

WITHDRAWAL OF RECORD.

See COSTS OF THE DAY.

SPECIAL JURY, 2.

WITNESS (COMMISSION TO EXAMINE).

The Court granted, on the application of the defendant, and without imposing any terms upon him, a commission to examine witnesses abroad, although the affidavit in support of the application did not shew that the evidence of the witnesses would be admissible in the cause, and although the witnesses resided at a great distance, and considerable delay would be occasioned by the commission being granted. *Dye v. Bennett*, 92

WRIT OF SUMMONS (AMENDMENT OF).

The Court will not alter a writ of summons from "promises" to "debt," to avoid the operation of the Statute of Limitations. *Phillips v. Lewis*, 156

WRIT OF SUMMONS (DATE OF).

See DATE OF WRIT OF SUMMONS (EVIDENCE OF).

DECLARATION, 6.

WRIT OF SUMMONS (SERVICE OF).

See COMPANIES CLAUSES CONSOLIDATION ACT, 2.

SERVICE OF WRIT OF SUMMONS ABROAD.

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